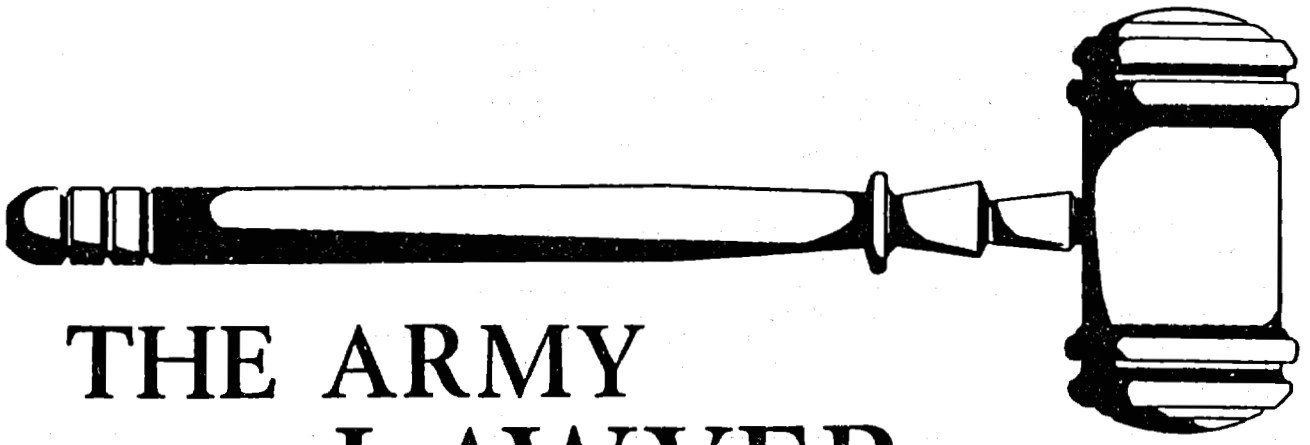

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Quality Assurance Evidence in Defense of Government Contract Claims

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Introduction

Some of the most common contract claims against the government involve allegations of defective specifications, improper inspection, interference, and impossibility. Performance difficulties attributed to these causes may result from defective quality assurance during manufacture. If defective quality assurance can be proven, the government will prevail.

Quality assurance evidence can be a contractor's "Achilles' heel." Quality programs are time-consuming, expensive, and often unpopular. When cost and schedule difficulties arise, quality often is perceived to be the cause of the problem or an impediment to rapid recovery. Quality standards and procedures are the first to suffer when trouble arises because quality is never expedient. The need to ship a product on time and within budget often tempts a contractor to skip a test, fail to retest after repair, use defective or marginal material, pass poor workmanship, not record a failure, or employ poorly trained or incompetent labor.[1] This type of misconduct is difficult to detect and may precede contract losses or default. Less flagrant behavior, however, often results in damaging admissions contained in contractor quality records and responses to government corrective action requests.

This article discusses how government contract trial attorneys may use quality assurance evidence in litigation. The approach may be adapted by procurement and adversary proceedings attorneys to avoid, or better prepare for, disputes. This article also explains what quality assurance evidence exists, where to find it, and how to use it.

Use of Quality Assurance Evidence

Quality assurance evidence is used in two ways. First, it can be employed as a stand-alone defense. Product conformance with design and performance requirements is not the only condition for acceptance under government contracts. The product also must be manufactured under certain controls. All government contracts contain some form of quality assurance requirement that is independent of product performance. If contractually required quality assurance controls are lacking, the product is defective even if it works.

The government uses statistical sampling for acceptance inspection and testing. Product uniformity—the assumption upon which statistical sampling is based—is assured by the contractor's quality controls. Without proper quality control, statistical sampling is untrustworthy, which leads to a lack of confidence in the product. The government relies upon its own in-process inspection and the contractor's quality assurance documentation to verify product conformance and uniformity. If quality assurance controls, such as inspection and testing, are not performed or documented properly, the product may be rejected, regardless of successful performance in sampling inspections.[2] Poor workmanship—a major quality issue undetected by functional testing—likewise is a basis for rejection, irrespective of performance. Noncompliance with contract quality assurance requirements, therefore, provides an independent basis for, and a defense to, improper default or constructive change allegations.

The second use of quality assurance evidence involves rebutting underlying assumptions and elements of proof or establishing concurrent causes.[3] Many disputes involve allegations of defective design and specifications, impossibility, interference, or over-inspection. Quality assurance evidence can rebut the underlying assumptions or elements of these theories of recovery. For example, an allegation of defective design assumes that the contractor properly followed the specifications. Testing this assumption focuses not on design, but on the contractor's manufacturing practices. Defective testing and inspection, poor workmanship, incompetent employees, marginal or defective material, and defective processes can cause a design to fail.[4] If the government can prove that quality

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[1] Quality assurance evidence may lead to findings of fraud. The aim of this defense, however, is not to build a fraud case. Rather, the objective in using this evidence is to win on the merits. Premature unsupported allegations of fraud can hurt the government more than they can help. If founded, of course, evidence of fraud cannot be ignored.

[2] *See* VIZ Mfg. Co., ASBCA No. 17,787, 78-2 BCA ¶ 13,469, at 65,868:

> The quality program and the manufacture of end items necessarily form an integral process; both are equally essential to delivery of goods meeting contract specifications and drawings. It is useless to a buyer, especially under a contract allowing inspection by sampling and more especially under a contract for military ordnance affecting life and limb, to receive the end items purchased if there is no assurance that they meet the specifications and drawings. It is the function of the contractor's quality program to provide that assurance.

[3] The government is not liable for damage it causes if an independent or concurrent cause exists outside of government control. *See* Wunderlich Contracting Co. v. United States, 351 F.2d 956 (Ct. Cl. 1965); Commerce Int'l Co. v. United States, 338 F.2d 81 (Ct. Cl. 1964); Umpqua Marine Ways, Inc., ASBCA No. 29532, 89-3 BCA ¶ 22,099.

[4] Government technical data packages tend to be imperfect—sometimes marginal. *See infra* notes 14-20 and accompanying text. To make them work requires talent, and proper manufacturing procedures, and proper controls. Quality problems can make the difference between acceptable performance and default.

that determine sample sizes as well as acceptance and rejection criteria. MIL-STD-105E will specify how many major and minor defects are allowed in a lot for acceptance. Even if only one critical defect is discovered, however, it always will cause lot rejection. Because the AQL is applicable only to lots—not to individual units[23]—an individual item may be rejected for any defect.[24] DCAS uses AQLs, MIL-STD-105E, and data package requirements to conduct acceptance or preshipment inspection and testing.

Unlike the government, the contractor uses both 100% inspection and sampling. Accordingly, each individual product is inspected prior to formation of production lots. Once the product is put into lots, however, subsequent contractor inspection is performed by sampling. If either the contractor or the government rejects a lot based on sampling inspection, the contractor must "screen"—that is, perform a 100% inspection—of the lot for the defect that caused rejection. Unfortunately, screening is time-consuming and expensive; it therefore contributes to the temptation for contractors not to record failures.

The Procuring Contracting Officer

The Army purchases its major supplies through the AMC's five centralized commodity commands.[25] Each command has a common organization. The contracting officer may look to large organizations in engineering, quality, logistics and funding for support. Each command has a directorate dedicated to quality assurance—a product assurance directorate (PAD). Within the PAD are quality assurance engineers and quality assurance specialists, as well as specialists in many other disciplines related to product quality. Most contracts require quality assurance review and will have a quality assurance engineer or specialist assigned to assist the contracting officer in quality matters. On larger contracts, the quality assurance engineers and specialists will visit contractor plants and deal directly with the contractor and DCAS. These interactions generate trip reports, inspection and test data, and memoranda to the contracting officer. The visits also give the participants personal knowledge of in-plant activity. The resulting product assurance files at the PAD are one source of quality assurance evidence.

Contracting officer files are another source of quality assurance evidence. Show-cause and cure notices are of particular interest. The contracting officer issues, or authorizes the ACO to issue, show-cause or cure notices. The show-cause notice should be issued if termination based on failure to deliver is contemplated.[26] The cure notice must be issued if termination based on failure to make sufficient progress or failure to perform other contract requirements is contemplated.[27] Normally, other correspondence will precede either notice. These notices invariably will prompt the contractor to generate internal memoranda and correspondence to the government, either of which may contain admissions.

Defense Contract Administrative Service

Unlike the centralized procuring commands of the individual armed services, DCAS has offices across the country supporting all government contracts. DCAS inspectors provide the comprehensive surveillance of contractor activities—sometimes on a daily basis—that the government requires.

Because of its decentralized operation, DCAS has a uniform contract administration program that it calls Procurement Quality Assurance (PQA). The DCAS "bible," the Defense Supply Agency Manual 8200.1 (DSAM 8200.1), *Defense In-Plant Quality Assurance Program*, describes DCAS's responsibilities and procedures. The DCAS inspectors who are primarily responsible for in-plant quality assurance are the quality assurance representatives (QARs) and quality assurance specialists (QASs). An understanding of DCAS's in-plant functions is crucial to effective location and use of quality assurance evidence.

DCAS acts in all phases of contract administration, from preaward surveys to acceptance of product. During contract performance, DCAS inspectors, QARs, and QASs conduct the inspections specified by DSAM 8200.1. CAS's most significant in-plant quality assurance activities are referred to as "procedures review," "procedures evaluation," "product verification inspection" and "corrective action." DCAS conducts these inspections during manufacture. DCAS also conducts preshipment and acceptance inspections, as well as tests on the finished product.

An important distinction between DCAS and the contracting officer's inspectors is that DCAS inspectors are

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[23] Although AQLs can be applied to units, Army specifications typically classify a unit of the product as either defective or nondefective and apply the AQL only to lots.

[24] *See* H & H Enter., ASBCA No. 26864, 86-2 BCA ¶ 18,749, at 94,711; MIL-STD-105E, para. 4.4.2 ("The selection or use of an AQL shall not imply that the contractor has the right to supply any defective unit of product."). Assume a sample of eight from a lot of 100 units is specified and the AQL allows lot acceptance on one defective item and rejection on two defective items. If one defective unit is found, the defective unit is rejected and returned to the contractor even though the lot is accepted.

[25] The commands are the Missile Command (MICOM); Armament, Munitions, and Chemical Command (AMCCOM); Communications-Electronics Command (CECOM); Aviation Systems Command (AVSCOM), and Tank-Automotive Command (TACOM).

[26] FARs 49.402-3(c), 49.402-3(e)

[27] *Id.* 49.402-3(d)

located at or near the contractor's plant, whereas the contracting officer's quality specialists are located at the command and must travel to the contractor's plant. Geography alone explains the significance of DCAS evidence.

DCAS In-Plant Quality Assurance

DCAS "procedures review" (PR) is the evaluation of the contractor's written quality assurance procedures.[28] A DCAS inspector will read the contractor's quality manual and procedures, and comment on their acceptability. "The contractor is given wide latitude in the development of written quality procedures to implement the requirements for a quality program or inspection system."[29] DSAM 8200.1 authorizes the inspector formally to notify a contractor of the "acceptability (as opposed to approval) of the procedures."[30] DOD Handbooks H-50, *Evaluation of a Contractor's Quality Program*,[31] and H-51, *Evaluation of a Contractor's Inspection System*,[32] provide guidance to both DCAS and contractors. PR will generate evidence of the process of developing an acceptable written quality or inspection system. Once in place, the contractor must follow its procedures.[33]

DCAS "procedures evaluation" (PE) involves verifying that the contractor is following its written quality and inspection procedures.[34] Government inspectors actually observe work being performed and compare it to written procedures and work instructions. How frequently procedures are evaluated depends upon where the government inspectors are assigned. If inspectors are assigned at the plant, PE may be conducted frequently. If not stationed at the plant, inspectors may conduct PE during visits to accept the product. PE is a significant source of evidence because it documents whether or not the contractor is complying with its own procedures. Any contractor can have a good paper program; PE, however, determines how serious a contractor is about implementing its programs. When DCAS PE uncovers a deficiency, it is documented and corrective action is required.

DCAS "product verification inspection" (PVI) consists of actual hardware inspection and testing by DCAS inspectors using the TDP's quality assurance requirements.[35] PVI consists of initial product inspection (IPI) and either intensified product verification (IPV) or reduced product verification (RPV). Government inspectors conduct IPI as early as possible. If IPI uncovers deficiencies, intensified surveillance—including IPV—monitors correction. If IPI demonstrates compliance with the specifications, RPV will follow. The system's ability to shift in and out of IPV and RPV is consistent with the sampling specification's reduced, normal, and tightened inspection procedures.[36] PVI activities are valuable sources of evidence because they deal directly with production at all levels—from piece or part, through assembly, to finished product. PVI complements PE and determines whether a contractor's product complies with the specifications. When a DCAS PVI uncovers a deficiency, it is documented and corrective action is required.

The most valuable evidence generated by DCAS in-plant activity is the "corrective action."[37] Whenever DCAS finds a deficiency, a corrective action must be issued. Four main corrective actions are defined in DSAM 8200.1—methods A, B, C, and D.

Method A consists of making an on-the-spot correction for minor deficiencies not requiring follow-up in cases in which correction as to cause can be accomplished immediately. Action may be noted on the back of DD Form 1711, Observation Record.

Method B consists of issuing the contractor a written notice of deficiency, DD Form 1715, Quality Deficiency Record (QDR), for defects requiring correction as to cause. Examples are noncompliance with written procedures; rejection of the product by the government; and critical or major defects noted during PVI, PE, or other inspections. The contractor must respond by identifying the cause and corrective action taken on the back of the DD Form 1715. QDRs are numbered sequentially by year and should indicate which type of inspection uncovered the deficiency. For example, if the fifth QDR issued during 1990 was a result of PVI, it would be QDR number PVI-90-5.

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[28] DSAM 8200.1 pt. 2.

[29] *Id.* para. 4-202d.

[30] *Id.* para. 4-202h.

[31] Dep't of Defense Handbook H-50 (1988), *reprinted in* DSAM 8200.1.

[32] Dep't of Defense Handbook H-51 (1988), *reprinted in* DSAM 8200.1.

[33] The contractor may change its procedures to match practices, but its written procedures and actual practice must match.

[34] DSAM 8200.1 pt. 3. A Product Oriented PE (POPE) also exists, which uses product conformance inspections to evaluate adequacy of and compliance with written procedures.

[35] *Id.* pt. 4.

[36] MIL-STD-105E, para. 4.7

[37] DSAM 8200.1 pt. 5.

Method C requires a formal written notice to the contractor's top management because of serious quality problems. Examples are an excessive number of method B corrective actions or a failure to correct repetitive deficiencies.

Method D is employed if a contractor cannot, or will not, comply with contract requirements. The inspector will request the ACO authority to stop all inspection. If the ACO agrees, he or she will request authority from the contracting officer. Cessation of inspection effectively will shut down a plant. The contractor rapidly must correct the problems or face default. If the government's decision to impose a method D corrective action is not justified, however, it may be considered a breach of contract.

QDRs, which result from method B corrective actions, identify deficiencies and document the contractor's response. Method C and D corrective actions indicate serious quality problems. The number and type of corrective actions alone can be important. Quality trends may become apparent if repetitive deficiencies exist after promised corrective action. A chronological compilation of corrective actions will provide trend evidence. The effectiveness of corrective action will disclose a contractor's true attitude about quality and provide powerful evidence. These records can rebut over-inspection claims because contractor employees indicate agreement with DCAS findings on QDRs. Failures to follow procedures and work instructions will evidence carelessness or disregard for quality. Repetitive deficiencies tend to prove the contractor's inability to correct and prevent defects; they also tend to establish a lack of control over processes, inspections, and tests. A contractor's paper program and rhetoric create a vision of a quality operation. DCAS inspection documentation, however, will aid in determining if that vision is reality or an illusion.

The Quality System Review (QSR) and Contractor Improvement Program (CIP) are management tools used by DCAS to ensure that the contractor resolves quality problems. The QSR is conducted by a team from DCAS and possibly contracting officer representatives, who perform an in-depth review of a contractor's total quality system. The QSR team records deficiencies discovered using QDRs. The team makes recommendations to the contractor aimed at attaining an acceptable quality system. The CIP involves DCAS management's keeping a list of contractors needing improvement. DCAS management reviews the list periodically—usually monthly—and works with contractors to have their names removed from the list.

In addition to inspection during production, DCAS has many other responsibilities. DCAS inspectors monitor first article testing and should recommend approval, conditional approval, or disapproval to the contracting officer.[38] DCAS inspectors comment on engineering change proposals,[39] nonconforming materials,[40] and other actions covered in DSAM 8200.1. All of this activity generates evidence.

DCAS Documents

DCAS apparently has a form for everything; therefore, knowing the forms helps in finding and organizing DCAS evidence. Remember, DCAS is a DOD organization and most DCAS documents are found only in DCAS files—not in PCO files. Trial attorneys *must* review DCAS files separately. The most important DCAS forms containing evidence are listed below.[41]

DD Form 250, Material Inspection and Receiving Report. Contractors submit this document with the product to be shipped. A DCAS inspector's signature on the DD Form 250 is required for shipment and payment.

DD Form 1222, Request for and Results of Tests. DCAS inspectors use this document to record the results of DCAS test surveillance. For example, it is used to record DCAS's observations of contractor first article testing and includes DCAS's recommendation to the contracting officer concerning first article approval, conditional approval, or disapproval.

DD Form 1232, QAR's Correspondence. This is a flexible form used by an inspector to "transmit PQA actions."[42] It is DCAS's equivalent of a memorandum.

DD Form 1711, Observation Record. DCAS inspectors record the results of PE, PVI, and any other QA observations on this form. It contains specific quantification of defect information.

DD Form 1715, Quality Deficiency Record. This form is probably the single most important quality assurance document. On it, the inspector records quality deficiencies and requires the contractor to take corrective action—in

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[38] *See id.* § VI, at 57 ("First Article Approvals.... disapproval will always be recommended whenever any nonconformance in the first article units of deviation from the first article approval test procedures is observed"). This policy is inconsistent with the right to conditional approval and arguably unwise. Fortunately, a recommendation of disapproval from DCAS is not binding on the contracting officer who properly will consider and grant conditional approval if justified.

[39] *Id.* § VII.

[40] *Id.* § VIII.

[41] Many other DCAS forms exist; however, the forms listed here are the ones most valuable in litigation.

[42] DSAM 8200.1 pt. 16, para. 9-1601.

particular, "method B" corrective action. On the back is space for the contractor's response, which should include the cause of the deficiency and the corrective action taken.

DD Form 1901, Plant Visit Request/Report. This is another flexible form used to record plant visit observations by DCAS personnel. Although anyone may use this form, it usually is filled out by personnel not assigned to the facility, such as supervisors, industrial specialists, and DCAS engineers making periodic visits.

DD Form 2019, Corrective Action Log. DCAS inspectors use this form to keep track of, in tabular format, corrective actions and suspense dates. It is an instant index of corrective actions.

Hypothetical: Contract Administration

To illustrate DCAS in-plant quality assurance and the use of DCAS forms, assume a contract for printed circuit boards. The contract requires a first article and specifies a MIL-Q-9858A quality system. The production rate is not high enough to assign a full-time DCAS inspector to the plant. Consequently, an "itinerate inspector" from the local DCAS resident office is assigned responsibility.

While the first article units are being manufactured, the contractor submits its quality manual and procedures to both DCAS and the PAD supporting the contracting officer. The DCAS inspector conducts a PR and finds the quality manual acceptable. The results of the PR are transmitted to the contractor either in a letter or on a DD Form 1232, QAR's Correspondence.

The first article circuit boards are manufactured and ready for testing. The contract requires the contractor to conduct the testing and submit a report to the contracting officer. The government is notified that the first article testing is about to commence and the DCAS inspector visits the plant to observe testing. The inspector observes first article testing and records his observations and recommendations on DD Form 1222, Request for and Results of Tests, which is sent to the contracting officer. He also may fill out a DD Form 1901, Plant Visit Request/Report, which is kept in DCAS files. The inspector noted workmanship defects and improper stress relief in component leads on the first article units, but recommended conditional approval based upon the contractor's promise to solve the problem. The first article is approved conditionally by the contracting officer, and production commences.

After several months, the inspector visits the contractor to perform PE, PVI, and IPI. The inspector takes the work instructions on component mounting and observes a worker mount components on circuit boards. The worker has a current copy of the work instructions, which are being followed. The inspector then moves down the production line to the final 100% visual inspection station to conduct PVI. The inspector selects several boards and, using the data package drawings, inspects them under a four-power halo light. The inspector finds several boards with "cold" solder joints—a major defect. The inspector informs the contractor's quality manager, who agrees with the inspector's assessment, and the boards are rejected. The inspector institutes a method B corrective action by making a QDR. This first QDR, for failing a PVI, will receive the number PVI-90-1. The inspector makes the QDR by completing an Observation Record, DD Form 1715, which documents the incident; he then gives the form to the contractor's quality manager. An entry also is made on the Corrective Action Log, DD Form 2019, which indicates that the contractor's response is due in seven days. As he is leaving the plant, the inspector notices contaminated solder flux at one solder station. The contractor immediately replaces the flux, correcting the problem. Accordingly, the inspector will record a method A verbal corrective action on the DD Form 1711, Observation Record.

The contractor's response to the QDR states that the cold solder joints were caused by a defective soldering iron at one station and that the iron was replaced. The response is accepted and the action is closed. The Corrective Action Log, DD Form 2019, is annotated with the date of contractor response and the fact that the action was closed.

Two months later, the first lot of one hundred boards is ready for delivery. The contractor requests acceptance inspection and the DCAS inspector visits the plant. Using the data package, AQLs, lot size, and MIL-STD-105E, the inspector randomly selects eight circuit boards. The inspector visually inspects the boards and observes a contractor technician performing electrical tests. Two of the eight boards fail to meet voltage requirements and are rejected. MIL-STD-105E specified lot acceptance on three defects, rejection on four defects. Therefore, the lot is accepted and the inspector signs and stamps[43] the DD Form 250, Material Inspection and Receiving Report. The two defective boards are returned for rework. While at the plant, the inspector conducts PE and PVI. The visit is recorded on a DD Form 1901, Plant Visit Request/Report.

Contractor Quality Administration

The contractor's quality program manual contains a schematic of production, inspection, and test flow; a plant management organization chart; and a floor plan. The manual contains many good documents that the practitioner can review to help understand a contractor's quality organization and formulate discovery requests.

[43] DCAS inspectors use a stamp with a distinctive eagle to authenticate signatures. Contractors also use a system of stamps to authenticate inspectors' signatures.

These documents should be in government files; if not, the attorney should ask for them in a preliminary request.

Just as DSAM 8200.1 is the DCAS bible, the quality manual is the contractor's bible. A good manual will identify and explain all elements of the quality organization and all of the procedures, responsibilities, and documents used. Practitioners should use the quality manual to focus document discovery and use the documents received to identify individuals[44] for depositions and to prepare for those depositions.[45] Where the manual is lacking, attorneys can use the requirements of the applicable standard—MIL-I-45208 or MIL-Q-9858A—to formulate discovery requests.

Each contractor will have its own system of forms. Some forms will travel with production units or lots along the production line. Each process and inspection is recorded. The government relies on these records to verify uniformity and product compliance. A series of forms also will deal with inspection status. Tags usually are used to distinguish clearly between conforming and nonconforming material. Additionally, forms are used to indicate calibration and maintenance of equipment. Incoming inspection will maintain records on material, parts, and other supplies. Vendor control records also should be maintained. Raw material will have metallurgical certificates or lab tests. Lengthy processes, such as heat treating, will have analog records of oven temperatures.[46] Some type of standard form will be used for internal correspondence. The myriad of forms makes a trial attorney's understanding of the contractor's record system essential.

A typical production facility has an incoming parts and material organization, and a production line starting with the simplest operation that progresses though various material processing, fabrication, and assembly operations, to final assembly. Inspection and test stations will exist, from beginning to end, as required by the TDP or as desired by the contractor.[47] A provision will exist to identify rejections, nonconforming materials, and rework or scrap. The quality assurance organization is responsible for the inspection and test functions, as well as the control and disposition of nonconforming materials. The quality assurance organization's functions should not be confused with the inspection responsibilities of the production department.[48] Some overlapping effort always will occur between quality and production; the quality assurance organization, however, audits production. Production then must react to correct and prevent the problems detected. The quality organization ensures that correction and prevention is accomplished and maintained. Counsel should take the time necessary to understand production and inspection operations, and to relate them to the floor plan where the witnesses work. This knowledge is helpful in formulating discovery and necessary to pursue quality assurance evidence effectively.

The organizational relationship and relative authority of quality and production organizations is very important. The quality organization should be independent of, and at a high level relative to, the production unit. If quality is organizationally subordinate to production, the opportunity for abuse is greater. Practitioners should not stop with a review of the organization chart; instead, they actually should test the organization chart by deposing employees, asking them how differences between production and quality are resolved.

The way the contractor segregates and controls nonconforming material is another area to examine. Usually a contractor will have good paper procedures in this area, but vigilance continually is required to ensure implementation. Inspection status of all material in the plant must be readily apparent. Nonconforming material promptly must be moved out of production areas and kept in locked, limited access areas. Proper control of nonconforming material requires good procedures and constant management emphasis. Therefore, counsel should ask DCAS inspectors and contractor workers how well nonconforming material is controlled.[49]

Another problem area is compliance with work instructions. In a MIL-Q-9858A program, each operation affecting quality must be described by "clear and complete documented instructions of a type appropriate to the circumstances."[50] Work instructions apply to both production and quality assurance employees. Workers may ignore written procedures if not properly supervised.

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[44] Counsel should search for working-level employees—possibly picking some at random—for interviews or depositions, depending upon their employment status. Worker testimony is the best evidence of in-plant quality procedures.

[45] Counsel who are confronted with many discovery documents often will find a computerized data base invaluable for this process. Counsel can screen discovery documents and judiciously select those for entry into the data base. Careful selection of issues will enable the data base to list documents by issue and witness. Keeping manual files with multiple copies of each document facilitates easy retrieval.

[46] Heat treating determines material strength and hardness, and must follow strict heating and quenching schedules. Improper material characteristics are invisible and can cause many manufacturing problems. These records often are overlooked.

[47] A contractor is free to impose more testing or tighter tolerances than required by the data package to increase production yields.

[48] Production workers may perform inspections and tests on their own work immediately after completion of a step. For example, the operator of a press may inspect every 100th part off his press in a forging or stamping operation. Quality assurance inspectors inspect the parts later.

[49] Production schedules may tempt individuals to use nonconforming material—particularly if the nonconformance is minor. A production organization also might be tempted to use a functional standard, rationalizing that if it works it must be acceptable.

[50] MIL-Q-9858A para. 3.3.

Failure to follow instructions results in ad hoc assembly and testing, which is unacceptable in a production environment. DCAS inspectors may identify other problem areas.

Practitioners must keep in mind that a large contractor almost always will have more documents[51] and people than the government can monitor effectively.[52] Quality control is an audit function; therefore, quality assurance documentation is less voluminous than production documentation, which chronicles every step of the production. Quality assurance documents will highlight problems and possible defenses. Although quality assurance documents can be entered into evidence either directly or by summaries, the documents alone will not be enough to perfect a defense. Witness testimony will be necessary to supplement and expand the incidents recorded in the documents. This testimony is critical to raising these incidents to the level of routine practice or behavior in a plant. DCAS and command witnesses routinely are called as witnesses for this purpose. The best way to broaden the application of quality assurance evidence, however, is with contractor employees. For example, a worker might testify that a problem recorded in a quality assurance document actually "happened all the time" or that he or she was "directed by management to do it."

Although some practitioners hold the view that government contractors have poor quality assurance programs, many believe just the opposite—that is, most experienced government contractors have good programs and care about quality. Unfortunately, the government's demand for strict compliance with its contracts can result in significant conflicts between production and quality at both management and working levels. These conflicts test the organizational resolve to support quality, which—if it exists at all—may fail. Allegations of defective specifications, government interference, and impossibility simply may be a cover-up for an ineffective quality assurance system.

After-the-Fact Quality Assurance Evidence

Quality assurance evidence, such as workmanship defects and defective material, remains in products after delivery to the government. It may be collected by inspections and tests long after delivery if the products have been in depot storage and the government can prove that no intervening cause for the defects exists.[53] A bad solder joint is not affected by storage. When products are sent to the field and used, quality assurance evidence gradually will be obscured by repairs. Unfortunately, the Army's system of reporting field failures is virtually useless from an evidentiary viewpoint.[54]

Hypothetical Continued: Contract Claim

The contractor in the earlier hypothetical is having problems manufacturing printed circuit boards. During PVI conducted just after acceptance of the first lot, the inspector found that the solder bath in the wave solder machine was not maintained at the proper temperature and that conformal coating was not being applied properly. Accordingly, two more QDRs, PVI-90-2 and PVI-90-3, were issued. The contractor was placed on increased PVI and the inspector began more frequent visits.

The contractor's quality manager responded to the QDRs. The temperature sensor in the wave solder bath was defective and replaced. The workers applying conformal coating were retrained in proper cleaning and application procedures. The corrective action was acceptable and both deficiency reports were closed out and recorded on the Corrective Action Log, DD Form 2019.

During the remainder of the first year, after first article conditional approval, two additional lots were accepted and ten additional QDRs were issued for workmanship defects; electrical performance, however, was acceptable. The contractor's quality manager agreed with all of the QDRs and took acceptable corrective action. Because of the frequency of QDRs, the contractor was placed on the CIP and DCAS conducted a QSR that resulted in several additional QDRs. The contractor's scrap rate was increasing and it registered complaints with DCAS and the contracting officer about government inspection.

Government inspection was requested when lot number four was completed. The inspector arrived and was presented with the circuit boards and a DD Form 250, Material Receiving and Inspection Report. The inspector

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[51] In one appeal, the contractor estimated that it made six million pages of documents—covering areas such as production, quality, financing, engineering, and management—available for government review. It also estimated that it delivered 300,000 pages pursuant to discovery requests. *See* E-Systems, ASBCA Nos. 32033, 32334, 32335, 88-2 BCA ¶ 20,753. The government uncovered evidence of fraud, the Department of Justice took jurisdiction, and E-Systems ultimately pleaded guilty and settled.

[52] Conversely, the number of government employees and documents almost always allows a contractor to depose every government employee involved and look at every government document—a distinct advantage.

[53] In *E-Systems* the Army disassembled and inspected hundreds of radios in depot storage at Tobyhanna Army Depot. The Army's decision to conduct this inspection was not based upon a desire to create evidence, but its lack of confidence in the radios manufactured by E-Systems. The litigation team took advantage of this inspection to create evidence in an organized manner. All defects found were coded and entered into a data base. Inspectors' work sheets were preserved and computer summaries were entered into evidence. The government found pervasive workmanship defects in the radios. The evidence supported the government's contention that the radios were defective and the default termination was justified.

[54] Contractors frequently argue that the absence of field failure data illustrates that the product is acceptable. The contractor often will cite the phrase, "The troops like it." The argument, however, assumes a failure reporting system that is capable of identifying causes of failures and relating that information to a manufacturer. Unfortunately, this does not occur unless the problem is massive. Quality defects may cause massive failures, but are more likely to result in reductions in mean-times-between-failures, which are not detected in a usable manner.

allowed the contractor to pull a random sample of eight boards from the lot of one hundred and conducted visual inspection using four power magnification. The inspector found soldering, conformal coating, and stress relief deficiencies in six of the eight samples; consequently, he rejected the lot. The inspector issued QDR PVI-90-14, recording his findings. The contractor subsequently missed the delivery date for lot four.

The contractor responded to QDR PVI-90-14 by disagreeing with the inspector's findings. The response was signed by the president of the company, who stated that the inspector was too meticulous, had "nit-picked" unreasonably, and had improperly used magnification during inspection. The contracting officer issued a show-cause notice which stated that the contractor had failed to deliver lot four on time and a termination for default was being considered. The contractor responded by alleging over-zealous inspection.

The contracting officer sided with DCAS and threatened termination. Although it disagreed with the inspection results, the contractor acquiesced and screened the lot. Fifty percent of the circuit boards were reworked. By this time, the contractor was represented by counsel who requested that the original six boards rejected from lot four by the government inspector be kept in a safe place. The lot was resubmitted, inspected by the same inspector, and accepted.

The contractor filed a claim for the costs associated with the screening and rework of lot four. It also claimed an amount for scrap costs allegedly caused by the over-zealous inspection during production. The claim was denied by the contracting officer and appealed to the ASBCA. In its complaint the contractor asserted government interference resulting from overzealous inspection.

A hearing was held before the ASBCA in the contractor's home town. The contractor based its case on expert testimony and introduced the six boards from lot four, which its attorney had requested to be kept. The contractor's witnesses testified that the conditions on the boards were acceptable. The government witnesses, however, testified that the conditions on the boards were not acceptable. Nevertheless, both sides acknowledged that visual mechanical inspection for workmanship involved some subjectivity.[55] The government entered all of the QDRs into evidence and offered the inspector's testimony on each one. The inspector testified about his recollection of the deficiencies and stated that the defects were similar to the defects on the six boards from lot four. The inspector testified that he used the same four-power magnification used by the contractor's inspectors.

The contractor's quality manager was cross-examined using each QDR and acknowledged that he had agreed with the inspector's findings and never objected to the use of magnification. He could not recall, however, if the defects were similar to those found in lot four.

Significantly, without the quality assurance evidence, the case would have been a head-to-head credibility battle between witnesses. Quality assurance evidence, however, gave the judge evidence of the contractor's contemporaneous agreement with the allegedly overzealous government inspector. This evidence was inconsistent with the contractor's litigation position and clearly tipped the balance of evidence in favor of the government.

Does Using Quality Assurance Evidence Work?

Not all cases lend themselves to the use of quality assurance evidence. The frequency of allegations of defective design, overinspection, interference, and impossibility, as well as the relatively few reported cases relying on quality assurance evidence and arguments, indicate that quality assurance evidence may not be used as often as merited.

In *Die Matic*[56] a small manufacturer defaulted on a contract for .50 caliber machine gun belt links. Die Matic appealed the default termination and claimed an equitable adjustment of over $800,000.[57] The contract required a MIL-I-45208 inspection system. The production line in this plant—which actually was a large garage—was relatively simple, consisting exclusively of mechanical operations. Roll steel entered the line and links were formed in a multistage die press operation. The links then were heat treated, plated, and packed. DCAS assigned a full-time inspector to the contractor's facility. The main allegation concerned overzealous inspection and interference by the DCAS inspector, Mr. Dugger. The appellant actually had evidence of inspector misconduct. In addition, the Armed Services Board of Contract Appeals (ASBCA) noted "that some of Dugger's acts and specifically many set out under item 5, are completely unacceptable by any standard."[58] The government's rule four file, however, contained all of the DCAS documents referred to above.

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[55] MIL-STD-2000, entitled "Standard Requirements for Soldered Electrical and Electronic Assemblies" was approved on 16 January 1989. This standard should reduce subjectivity. It presents text and pictures describing acceptable and unacceptable conditions. Subjectivity also is reduced by training. Some contractors employ inspection "training aids," such as physical examples of acceptable and unacceptable conditions. Contractors typically argue subjectivity when workmanship is at issue, but the margin of error between trained inspectors is small.

[56] ASBCA No. 31185, 89-1 BCA ¶ 21,342, *aff'd*, No. 89-1303 (Fed. Cir. 1989).

[57] The equitable adjustment claim was tried first, which effectively disposed of the default appeal.

[58] *Die Matic* 89-1 BCA ¶ 21,342, at 107,602. The ASBCA found that the QAR used company telephones for personal business, borrowed a company truck, was absent from work on personal business, was given a nonoperational trolling motor and battery, and sold small items to company employees on one or more occasions. The ASBCA held that these "commercial transactions between Dugger and Appellant or some of its employees did not affect Dugger's actions under the contract." *Id.*

In particular, the QDRs contained not only the comments made by the allegedly overzealous inspector, but also the contractor's responses, which actually indicated agreement. The Board stated:

> A total of 30 QDR's were issued during the contract, 29 of which were issued by Dugger. This is not an unreasonable number for the more than two years Dugger was the QAR for the contract. Over one-fourth of the QDR's concerned, at least in part, Appellant's failure to control non-conforming parts. Other subjects within those QDR's included: product defects such as links not meeting the Rockwell hardness and links with white stains due to sludge in the plating tanks; packing wet links; and improper acid level in phosphate coating bath. Appellant's responses indicate agreement with all but one QDR which was issued by Dugger and which dealt with whether the angle on the link was a required test. We find Appellant's agreements with the QDR's were not due to coercion.[59]

Monthly delivery status reports submitted by the contractor cited material, equipment, supplier, and other problems—not government interference—as the cause of delays. At trial, the government presented the inspector, other DCAS witnesses, Die Matic's former quality manager, and former Die Matic employees, who testified that the government inspector's misconduct did not affect his ability to inspect. The contractor presented contrary testimony from the owner and other employees.[60] In denying the appeal, the ASBCA found that the alleged misconduct "either did not occur, or at most caused only minor inconvenience or delay to Appellant and [was] not a breach of contract."[61] Accordingly, even though the government could not disprove the alleged misconduct, it successfully used quality assurance evidence to rebut the underlying assumption and element of proof that the misconduct caused the high scrap rate and resulting cost overrun.

Likewise, in the appeals of *E-Systems*, the government introduced twenty linear feet of documents, including all DCAS QDRs and associated evidence.[62] The appeals involved terminations for default and equitable adjustment claims of approximately twenty-five million dollars on the defaulted and other contracts. These contracts were for the manufacture of the Army's VRC-12 radios. The government required a MIL-Q-9858A quality system. The complicated production process included many touch-labor electromechanical operations such as parts mounting, soldering, and mechanical assembly. Extensive inspection and testing were required, including environmental testing. Among E-Systems' major allegations were improper disapproval of first article, defective design, changed inspection standards, and overzealous inspection.

As it did in the *Die Matic* case, the government made quality an issue. In particular, it cited E-System's lack of workmanship and defect correction to undermine the contractor's allegations. E-Systems argued that it was entitled to conditional approval of its first article because the defects noted—if they actually were defects—were readily correctable in production. The government argued, however, that conditional approval of the first article was not appropriate because it was a production first article, meaning that the production quantity was complete. Correction, therefore, required opening up completed radios, rather than correcting production line procedures.

Using quality assurance evidence, the government also hoped to prove that E-Systems had been unable to correct similar defects in the past. The government contended that poor workmanship, as evidenced by after-the-fact inspections, and a poor quality history rebutted the design and overzealous inspection allegations.[63] Within weeks of trial, the government obtained testimony from former working-level employees that so interested the Department of Justice that the ASBCA case was postponed while a criminal investigation ensued.[64]

Most recently, quality assurance evidence was used in the appeal of *David B. Lilly Co.*[65] This action covered appeals of a termination for default and requests for equitable adjustments of several million dollars. Lilly asserted

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[59] *Id.*, 89-1 BCA ¶ 21,342, at 107,597 (citations omitted).

[60] The ASBCA found that the appellant's witnesses were not credible. *Id.*

[61] *Id.* at 107,602.

[62] The government used a computer data base to manage the voluminous discovery documents, prepare for depositions, and assemble the government's rule four submission. The contractor also introduced about twenty linear feet of documents in its rule four file.

[63] This is an oversimplification of the government's litigation strategy in a case that was estimated would take two months to try and included thousands of documents and dozens of witnesses.

[64] *See generally E-Systems*, 88-2 BCA at ¶ 20,753. In January 1990, a federal jury found a former E-Systems production line quality supervisor guilty of perjury for testimony concerning quality assurance procedures given during an ASBCA deposition. *See* United States v. Hobbs, No. 89-230-CT-T-13(A) (M.D. Fla. Jan. 9 1990) (unpublished). *See generally* Buonocore, *Perjury During an Agency Board Proceeding*, The Army Lawyer, Apr. 1991, at 7. On 1 August 1990, a federal grand jury indicted four former E-Systems managers on charges of falsifying production records and test results. On 21 August 1990, the ASBCA appeals were dismissed with prejudice as a result of a settlement between E-Systems and the Department of Justice Criminal and Civil Fraud divisions. Under the terms of the settlement, E-Systems paid over four million dollars and waived what its attorneys asserted were $35 million worth of claims.

[65] ASBCA Nos. 34678, 34679, 34680 (appeal pending).

allegations of impossibility, overzealous inspection, and interference. The contract involved the manufacture of two bomb lugs for the Navy. The contract required a MIL-I-45208 inspection system. The production process in this case was purely mechanical. The lugs were manufactured from steel bar formed in various forging operations; threads were rolled, and the lugs were heat treated and plated. Among the major issues were the use of thread ring gauges, electromagnetic "magnaflux testing," and thread rolling. The quality assurance evidence submitted by the government included all of the QDRs (sixty-six from 1984 to 1987),[66] the results of QSR, a method C corrective action, and numerous trip reports from command and DCAS quality and technical representatives.

At trial, the government called as witnesses DCAS inspectors, Navy gauge experts, Army contracting specialists, a Navy quality assurance expert, and Army depot inspectors. It also called a gauge manufacturer as an expert witness. Quality assurance evidence was used to support arguments that the contractor's difficulties with "nonmetallic inclusions" in forgings and its inability to obtain proper threads on bomb lugs was caused by sloppy manufacturing, improper gaging practices, use of nonconforming material, and the fact that the production department ran the plant.[67] Control of nonconforming material, failure to correct deficiencies, and improper work procedures were issues pursued by the government. Two former employees—one a former quality manager—were called to corroborate and expand this evidence.[68] The case is pending decision.

One of the most outrageous cases of contractor disregard for quality is seen in *A.C. Ball Co.*[69] The defaulted contract was for product improvement modification kits for tank hulls. The contractor alleged improper default using the typical assertions of defective specification, improper disapproval of first article, and government interference. The contract required a MIL-I-45208 inspection system. The contractor subcontracted out all manufacturing, performing only assembly and inspection in house. The government introduced QDRs which indicated that A. C. Ball repeatedly failed to control vendors and problems with nonconforming material. Two of the contractor's former quality assurance managers testified *for the government* revealing that the company threatened QA inspectors if they rejected the product, that company support to QA was cut back when items were rejected, that QA was not allowed to see the contract, that unauthorized repair was routine, that inspection data was routinely falsified, that known defective products were passed, and that MIL-STD-105 sampling was not followed. In addition, many field failures were documented. Quality assurance evidence overpowered the appellant and the appeal was denied.

Quality assurance evidence successfully has rebutted allegations that specifications were not suitable for "quantity production with high acceptance yield"—that is, the scrap rate was too high. In *Kollsman Instrument Corp.*[70] quality assurance evidence established that the high scrap rate was caused by poor workmanship and failure to control nonconforming material. The ASBCA placed "considerable reliance"[71] on the contemporaneous quality assurance evidence and concluded, "The contributions of the Appellant to adverse production experience so outweigh the five remotely possible interference points at the outer limits of certain tolerance combinations that we cannot attribute any damage to the Appellant from such minor defects in the TDP."[72]

The ASBCA places great weight on contemporaneous quality assurance evidence. In *Wright Industries, Inc.*[73] it stated, "Because we believe that the reasons for rejection/scrap ascribed by Appellant during contract performance provide the best evidence as to the causes of its excessive rejection/scrap rates, we have analyzed the QDR's."[74] The ASBCA concluded that the excessive scrap rate experienced by Wright Industries was caused by "inexperienced, careless and incompetent personnel"—not the government's TDP.[75] In *Baifield*

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[66] The government introduced copies of the QDRs into evidence and used QDRs during direct examination. A chart indicating the nature of the defect and the appellant's response was included in the post-hearing brief.

[67] The first paragraph of the government's 150-page brief set the tone:

> In these appeals the David B. Lilly Company, Delfasco Forge Division (hereinafter "Delfasco") would have the Board believe that it operated a well-organized, competent manufacturing facility, and produced conforming suspension lugs until a new QAR, along with a Navy gage official, changed the rules. Delfasco Forge was, in fact, more interested in production rates than quality, did not follow its own procedures, did not comply with MIL-I-45208, improperly set its gages to pass product, failed to police its subcontractors, and failed to conduct tests and inspections properly. Delfasco Forge has repeatedly experienced such problems, has been informed of them by the government, and yet has responded only with lip service rather than with lasting corrective action.

Id.

[68] The plant was in Texas and most of the former workers spoke Spanish, which made locating and interviewing potential witnesses difficult.

[69] ASBCA No. 27677, 86-2 BCA ¶ 18,744.

[70] ASBCA No. 14849, 74-2 BCA ¶ 10,837.

[71] *Id.* at 51,575.

[72] *Id.*

[73] ASBCA No. 18282, 78-2 BCA ¶ 13,396.

[74] *Id.*, 78-2 BCA ¶ 12,308, at 65,478.

[75] *Id.* at 65,479.

Industries, Division of A-T-O, Inc.[76] the appellant alleged that the government's inspection was overly strict and improper. Baifield Industries claimed fifteen million dollars, but recovered only $137,123.82, for defective government-furnished equipment and improper ring gauge tests. It lost the big dollar claims because of quality assurance evidence. The ASBCA noted:

> The record includes hundreds of responses to quality deficiency reports, memoranda (both internal and to the government) and correspondence to the government in response to show cause letters. With the exception of the comments noted pertaining to gaging techniques and one or two other isolated disagreements on matters other than metal defects, this documentation provides no evidence of overly strict government inspection or an inability to perform because of the lack of standards. In contrast, the record does establish that the Appellant was concerned with the quality of inspection being performed by its personnel and that it was consistently conducting training for its inspectors. There is no indication that the Appellant was hampered in this training because of a lack of knowledge as to what was an acceptable case.[77]

Not all admissions contained in contractor responses to QDRs are fool-proof. The trial attorney must investigate the understandings of the parties before relying on QDRs. For instance, in *H & H Enterprises* the ASBCA found that the contractor's statements of actions taken to correct defects noted by DCAS on QDRs were not admissions.

> We find that, based on the actual understandings of the parties in this particular case as well as on the manner in which DD Form 1715 is commonly used, Appellant's representative did not intend to indicate agreement that the alleged defects were in fact defects and the government's *inspector* did not believe she so intended.[78]

Apparently the government's own witness, the DCAS inspector, undermined these admissions by agreeing with appellant. Without DCAS agreement, the contractor's testimony would have been self-serving, inconsistent with the contemporaneous documents, and probably not believed. The trial attorney must ensure that DCAS witnesses will support the admissions in DCAS documents.

Conclusion

The government assigns trial attorneys to a case after docketing at the ASBCA. By then, the contractor's trial attorneys—usually outside counsel—will be way ahead in their understanding of the case and formulating a strategy. Sophisticated contractors will bring in trial attorneys early, specifically to assess litigation risks and to set strategy. When the contracting officer signs the final decision, the factual and legal issues largely have been predetermined by the allegations in the contractor's claim. Even when the government has the burden of proof—as in a termination case—and the contractor may have filed only a cursory claim and complaint, counsel can be assured that the contractor is far more prepared than meets the eye.

The government trial attorney must not simply adopt the same view of the issues that the contractor has articulated or that the command's final decision delineates.[79] Although the government's initial pleadings typically will be limited to the facts supporting the final decision, the government should use discovery to identify new issues and strive to frustrate the contractor's game plan by putting the contractor on the defensive. In the right case, quality assurance evidence can do just that.

The type of quality assurance evidence that is useful to the government in litigation is always derogatory and bears directly on a company's reputation. Expect a strong reaction from the company and a tough, emotional fight. The effect on reputation and the "unclean hands"[80] aspect of this evidence, however, is what makes it so powerful.

Quality assurance evidence will result in voluminous document submissions and tedious trials. The defense is most effective when the documents serve only as a foundation for testimony. The most effective testimony is from the contractor's present and former employees. The employees who know the most about quality compliance in the plant are the production line workers; counsel specifically should seek them out.

Quality assurance evidence provides a defense—perhaps an offense—that works and, in appropriate cases, should be developed during discovery.

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[76] ASBCA No. 13418, 77-1 BCA ¶ 12,308.

[77] *Id.*, 77-1 BCA ¶ 12,308, at 59,401.

[78] *H & H Enter.*, 86-2 BCA ¶ 18,794, at 94,697 (emphasis added).

[79] Formal discovery is not available to contracting officers. This limits final decisions to facts available in-house. In addition, DCAS documents are not available in contracting office files.

[80] Although the ASBCA does not deal officially in equity, it is an ever present consideration.

USALSA Report

United States Army Legal Services Agency

The Advocate for Military Defense Counsel

DAD Notes

To Swear or Not to Swear: The Sky's the Limit

In two recent cases, *United States v. Rosato*[1] and *United States v. Provost*,[2] the Court of Military Appeals decided the extent of an accused's right to make an unsworn statement on sentencing.

In *Rosato* the military judge limited the content of the accused's unsworn statement. Airman Basic Rosato was allowed only to state his desire to be enrolled in a rehabilitation program offered by the Air Force. He also wanted, however, to relate his understanding on how rigorous this program was, based on information he had received from prisoners enrolled in the program. The military judge ruled that going into details about what other people had told the accused about the rehabilitation program was not appropriate. This restricted the content of the accused's unsworn statement.[3]

In *Provost* the accused pleaded guilty to unauthorized absence and attempted larceny of a motor bike. In his unsworn statement during the presentencing phase of trial, Specialist Provost stated that his motivation for committing the offenses was concern for his family. He went on to state that he never had stolen anything before.[4] In rebuttal, the military judge allowed the trial counsel to introduce testimony and exhibits showing that the accused had uttered twenty-six worthless checks totaling $2,342.72. Following this evidence of uncharged misconduct, the accused sought to make another unsworn statement in surrebuttal to explain why he had uttered the bad checks. The military judge, however, ruled that the accused could not rebut sworn testimony by way of an unsworn statement. The Army Court of Military Review upheld the trial judge's decision, holding that an accused may make only one unsworn statement.[5]

The Court of Military Appeals decided *Rosato* and *Provost* on the same day. In *Rosato* the court concluded that the accused's right to make an unsworn statement is a valuable right that generally is considered to be unrestricted. The court went on to hold that the military judge improperly restricted the accused's sentencing rights and remanded the case to the Air Force Court of Military Review for a reassessment of the sentence.[6]

In *Provost* the Court of Military Appeals noted that Rule for Court-Martial (R.C.M.) 1001(c)(2)(A) clearly permits the use of an unsworn statement to rebut matters presented by the prosecution. The court also noted that an unsworn statement is not evidence.[7] Accordingly, the issue is not whether unsworn evidence may be used to rebut sworn evidence. The court also reiterated the fundamental importance of an accused's allocution rights. Therefore, following the clear language of R.C.M. 1001(c)(2)(A), the court ruled the military judge and the Army Court of Military Review erred in holding that Specialist Provost could not make an unsworn statement to explain the bad checks. Consequently, the court remanded the case to the Army Court of Military Review for a reassessment of the sentence without giving consideration to the bad checks.[8]

The holdings in these cases indicate that an accused's allocution rights essentially are unlimited. These decisions undoubtedly will strengthen the use of unsworn statements as a defensive tool in extenuation and mitigation on sentencing. Defense counsel should be aware of these cases when the government objects and attempts to limit an accused's unsworn statement in the future. Captain Armbruster.

Powers to the People: The Supreme Court Bans Racially Discriminatory Peremptory Challenges

The Supreme Court's decision in *Powers v. Ohio*[9] establishes a new safeguard against racism in civilian jury selection and should prove valuable to military jurisprudence as well. Although accused soldiers continue to lack the sixth amendment right[10] to trial by a "represent-

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[1] 32 M.J. 93 (C.M.A. 1991).

[2] 32 M.J. 98 (C.M.A. 1991).

[3] *Rosato*, 32 M.J. at 94.

[4] *Provost*, 32 M.J. at 99.

[5] *See id.*

[6] *Rosato*, 32 M.J. at 95-96; *see also* Manual for Courts-Martial, United States, 1984, Rules for Courts-Martial 1001(c)(2)(C) [hereinafter R.C.M.].

[7] *Provost*, 32 M.J. at 99.

[8] *Id.*

[9] 111 S. Ct. 1364 (1991).

[10] "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed." U.S. Const. amend. VI.

ative cross-section of the population,"[11] the decision in *Powers* should prohibit the improper exclusion of racial minorities from court-martial panels, even when the accused is not of a racial minority.

The defendant in *Powers* was a white male. At trial, the prosecutor exercised his first peremptory challenge to remove a black venireperson. The defense then requested the trial court to compel the prosecutor to explain, on the record, his reasons for excluding a black person. The trial court denied the defense request, and excused the juror in question. The prosecutor then used nine more peremptory challenges, removing six more black venirepersons. The defense renewed its objection each time, citing *Batson v. Kentucky*.[12] Each objection was overruled. The defendant subsequently appealed his conviction, relying upon the sixth amendment guarantee of a jury composed of a fair cross-section of the community and the fourteenth amendment's equal protection clause.[13]

In reversing the trial court's ruling, the Supreme Court invoked the equal protection clause of the fourteenth amendment and the Civil Rights Act of 1875.[14] The Court observed:

> Jury service is an exercise of responsible citizenship by all members of the community, including those who otherwise might not have the opportunity to contribute to our civic life.... [R]acial discrimination in the qualification or selection of jurors offends the dignity of persons and the integrity of the courts.... [A] criminal defendant may object to race-based exclusions of jurors effected through peremptory challenges whether or not the defendant and the excluded juror share the same race.[15]

The *Powers* decision expands upon the Supreme Court's earlier ruling in *Batson v. Kentucky*. In that case, the defendant was a black male who objected to the prosecutor's use of peremptory challenges to strike all four black persons on the venire, resulting in the selection of a jury composed only of white persons. On appeal, the United States Supreme Court held that

> the State's privilege to strike individual jurors through peremptory challenges is subject to the commands of the Equal Protection Clause. Although a prosecutor ordinarily is entitled to exercise peremptory challenges 'for any reason at all, as long as that reason is related to his view concerning the outcome' of the case to be tried, the Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their race or on the assumption that black jurors as a group will be unable impartially to consider the State's case against a black defendant.[16]

According to the Court in *Powers*, "*Batson* recognized that a prosecutor's discriminatory use of peremptory challenges harms the excluded jurors and the community at large."[17] The *Batson* decision did not address the question of a defendant's standing to object to racially discriminatory challenges when the defendant belongs to a race different from the race of the challenged jurors. The Court did, however, set forth the rule that, when a defendant makes a prima facie showing of racial discrimination on the part of the prosecutor in his or her exercise of peremptory challenges—that is, when the prosecutor has followed a "pattern" of challenging members of the defendant's race—the state must "come forward with a neutral explanation" for challenging the jurors in question.[18] For the prosecutor merely to deny that he or she had a discriminatory motive or for the prosecutor to affirm his or her good faith is insufficient.[19] Rather, the prosecutor "must articulate a neutral explanation related to the particular case to be tried. The trial court then will have the duty to determine if the defendant has established purposeful discrimination."[20]

The Court of Military Appeals first applied *Batson* in *United States v. Santiago-Davila*.[21] Although the court declined to recognize a sixth amendment right to a court-

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[11] United States v. Santiago-Davila, 26 M.J. 380, 389 (C.M.A. 1988).

[12] 476 U.S. 79 (1986).

[13] "No State shall ... deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV.

[14] "No citizen possessing all other qualifications which are or may be prescribed by law shall be disqualified for service as grand or petit juror in any court of the United States, or of any State on account of race, color, or previous condition of servitude." 18 U.S.C. § 243 (1988).

[15] *Powers*, 111 S. Ct. at 1366.

[16] *Batson*, 476 U.S. at 89 (citation and footnote omitted).

[17] *Powers*, 111 S. Ct. at 1368.

[18] *Batson*, 476 U.S. at 97.

[19] *Id.* at 98.

[20] *Id.* (footnote omitted).

[21] 26 M.J. 380 (1988).

martial panel "drawn from a representative cross-section of the population,"[22] the court did recognize that "[t]he right to equal protection is a part of due process under the Fifth Amendment;[23] and so it applies to courts-martial, just as it does to civilian juries."[24] Therefore, the court considered itself bound to follow the *Batson* decision, and held that a military accused has "an equal-protection right to be tried by a jury from which no 'cognizable racial group' has been excluded."[25] In a footnote, however, the court observed that "[o]nly a member of the excluded group can assert an equal-protection violation."[26]

In *United States v. Moore*[27] the Court of Military Appeals simplified the accused's obligation to establish a prima facie case of discrimination when objecting to challenges under *Batson*. The court adopted the following per se rule: "Upon the Government's use of a peremptory challenge against a member of the accused's race and upon timely objection, trial counsel must give his reasons for the challenge."[28] The rationale behind this per se rule is that, "[i]n military trials, it would be difficult to show a 'pattern' of discrimination from the use of one peremptory challenge in each court-martial."[29] Henceforth, "every peremptory challenge by the Government of a member of the accused's race, upon objection, must be explained by trial counsel."[30] The military judge then must

> determine whether trial counsel has articulated a neutral explanation relative to this particular case, giving a clear and reasonably specific explanation of legitimate reasons to challenge this member. Although the reasons stated need not rise to the level justifying a challenge for cause, trial counsel cannot assume or intuit that race makes the member partial to the accused and cannot merely affirm his good faith or deny bad faith in the use of his challenge.[31]

The *Santiago-Davila—Moore* line of cases limited an accused's standing to object to discriminatory challenges to cases in which the challenged panel member was of the same race as the accused. The decision in *Powers*, however, should remove that limitation because the limitation is contrary to "substantive guarantees of the Equal Protection Clause and the policies underlying federal statutory law."[32] The *Powers* Court noted that a litigant—a litigant who, in *Powers*, was a white defendant—ordinarily "cannot rest a claim to relief premised on the legal rights or interests of third parties"[33]—third parties who, in *Powers*, were black jurors excluded by a racist peremptory challenge. A litigant, however, may bring an action on behalf of a third party, if: (1) the litigant has suffered an "injury-in-fact" that gives him an interest in the outcome of the case; (2) the litigant has a close relation to the third party; and (3) the third party is himself or herself unable to bring the action.[34] The Court found that each of these requirements is met in the case of an accused who objects to a racist peremptory challenge.

With respect to the first requirement—an "injury-in-fact"—the Court explained:

> The jury acts as a vital check against wrongful exercise of power by the State and its prosecutors. The intrusion of racial discrimination into the jury selection process damages both the fact and the perception of this guarantee.
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> ...
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> A prosecutor's wrongful exclusion of a juror by a race-based peremptory challenge is a constitutional violation committed in open court at the outset of the proceedings. The overt wrong, often apparent to the entire jury panel, casts doubt over the obligation of the parties, the jury, and indeed the court to adhere to the law throughout the trial of the cause.
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> ...
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> The purpose of the jury system is to impress upon the criminal defendant and the community as a whole that a verdict of conviction or acquittal is given in accordance with the law by persons who are fair. The verdict will not be accepted or understood in these terms if the jury is chosen by unlaw-

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[22] *Id.* at 389. The court found that Uniform Code of Military Justice art. 25, 10 U.S.C. § 825 (1982) [hereinafter UCMJ] (providing for composition of court-martial panels by officers or, upon request of an enlisted accused, by enlisted members not junior to the accused comprising at least one-third of the total membership of the court), "contemplates that a court-martial panel will not be a representative cross-section of the military population." *Santiago-Davila*, 26 M.J. at 389.

[23] "No person shall be ... deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V.

[24] *Santiago-Davila*, 26 M.J. at 390 (citations omitted).

[25] *Id.*

[26] *Id.* at 390 n.9 (citing Uelman, *Striking Jurors Under* Batson v. Kentucky, 2 Crim. Just. 3, 3-4 (Fall 1987)).

[27] 28 M.J. 366 (C.M.A. 1989).

[28] *Id.* at 368.

[29] *Id.*

[30] *Id.*

[31] *Id.* at 369.

[32] *Powers*, 111 S. Ct. at 1368.

[33] *Id.* at 1370.

[34] *Id.* at 1370-71.

ful means at the outset. Upon these considerations, we find that a criminal defendant suffers a real injury when the prosecutor excludes jurors at his or her own trial on account of race.[35]

In addressing the relationship between the accused and the challenged jurors, the Court noted:

> Both the excluded juror and the criminal defendant have a common interest in eliminating racial discrimination from the courtroom. A venireperson excluded from jury service because of race suffers a profound personal humiliation heightened by its public character. The rejected juror may lose confidence in the court and its verdicts, as may the defendant if his or her objections cannot be heard. This congruence of interests makes it necessary and appropriate for the defendant to raise the rights of jurors.[36]

Finally, regarding the ability of excluded jurors to assert their own rights, the Court stated:

> The barriers to a suit by an excluded juror are daunting. Potential jurors are not parties to the jury selection process and have no opportunity to be heard at the time of their exclusion. Nor can excluded jurors easily obtain declaratory or injunctive relief when discrimination occurs through an individual prosecutor's exercise of peremptory challenges.... The reality is that a juror dismissed because of race probably will leave the courtroom possessing little incentive to set in motion the arduous process needed to vindicate his own rights.[37]

Accordingly, a defendant has standing to object to a racially discriminatory peremptory challenge, even when the defendant himself is not a member of the same race as the challenged juror.

The equal protection analysis relied upon by the Supreme Court in *Powers* applies with equal force to the military setting—perhaps even more so in light of the unrepresentative nature of military juries. An accused soldier commonly is tried by a panel composed primarily of officers and enlisted members drawn from the ranks of senior noncommissioned officers.[38] To permit trial counsel to reduce the range of potential court members further by employing racism in the exercise of peremptory challenges—even when the accused is white—would be unconscionable. The military accused should have the same standing to object to this abuse of the jury selection process as a civilian defendant. Moreover, the same reasons that justified the establishment of the per se rule in *Moore* should make that rule applicable to objections raised pursuant to *Powers*. The military accused is entitled to only one peremptory challenge.[39] Therefore, requiring him or her to show a "pattern" of discrimination in trial counsel's challenges to make a prima facie case of discrimination is impractical. If the government peremptorily challenges a minority member of a court-martial panel, and the defense objects, then trial counsel should be required to articulate a racially neutral basis for the challenge, regardless of the race of the accused. Captain Wells.

Dereliction of Duty and the Defense of Ineptitude

In the recent case of *United States v. Powell*[40] the Court of Military Appeals discussed ineptitude as a defense to a charge of dereliction of duty. In so doing, the court provided trial defense counsel in the field with a bit of guidance on the employment of that defense.

The issue in Powell was whether the military judge erred by failing to hold that ineptitude provided a defense to a dereliction charge when an accused of limited abilities, operating with minimal command support, failed to manage properly a communication material system for a Marine Corps division. Lieutenant Powell was charged with eleven specifications of dereliction of duty, all of which concerned his alleged dereliction in the performance of his duties as the Communication Material System Custodian at Camp Pendelton, California. Contrary to his pleas, he was convicted of four of the specifications.[41] The Court of Military Appeals considered the military judge's comments and not guilty findings as indicative that the issue of inappropriate command support was considered at trial.[42]

The court upheld the lower court's opinion, affirming the findings and sentence. Nevertheless, the opinion

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[35] *Id.* at 1371-72 (citation omitted).

[36] *Id.* at 1372.

[37] *Id.* at 1373.

[38] *See* UCMJ art. 25.

[39] *Id.* art. 41(b).

[40] 32 M.J. 117 (C.M.A. 1991).

[41] In entering findings of not guilty to eight of the specifications alleging dereliction of duty by culpable inefficiency, the military judge indicated that he was not convinced beyond a reasonable doubt that the accused did not have a reasonable or just excuse. He specifically commented that a factor in his deliberations was the appearance of insufficient command attention and supervision in this case. *See id.*

[42] *Id.* at 121.

provides defense counsel with fuel for argument in the appropriate case in which ineptitude is offered as a defense to a charge of dereliction of duty.[43] The court pointed out that the defense of ineptitude is largely fact-specific because the applicability of the defense depends upon a consideration of the duty imposed, the abilities and training of the soldier upon whom the duty is imposed, and the circumstances in which he or she is called upon to perform this duty.[44] The defense is available when either a willful or negligent dereliction is charged, but will succeed only when inept conduct—rather than willful conduct—caused the dereliction.

Trial defense counsel should be aware that *Powell* implies that a legitimate defense tactic in this area could involve an attack focusing on command inactivity when the command knew or should have known of the unsatisfactory duty performance, or lack of ability or necessary training, that ultimately resulted in the charge. A situation involving a young soldier, or a soldier working outside his or her specialty—especially when the duties require detailed procedure or are of a highly technical nature—would provide a strong foundation for this defense. In discussing the defense with clients, trial defense counsel may want to emphasize that reliance on the defense of ineptitude should not be considered as demeaning. Rather, the defense provides a means to focus attention on significant issues involving training, the specific nature of the duties involved, and inadequate command support. Government counsel often view dereliction of duty as a fairly easy charge to prove. The defense of ineptitude holds the government to its burden of proof and, in the appropriate case, forces the command to take what may be an unflattering view of itself. Captain Toole.

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[43] Manual for Courts-Martial, United States, 1984, Part IV, para. 16c(3)(d) provides that a person is not derelict in the performance of duties if the failure to perform those duties is caused by ineptitude rather than willfulness, negligence, or culpable inefficiency, and it may not be charged under UCMJ article 92, or otherwise punished. For example, a recruit who has tried earnestly during rifle training and throughout record firing is not derelict in the performance of duties if he or she fails to qualify with the weapon.

[44] *Powell*, 32 M.J. at 121.

Clerk of Court Notes

Boxes Without Topses

The Clerk of Court occasionally receives records of trial in boxes that have been "reconditioned"—that is, rewrapped and sealed in plastic—by the United States Postal Service. The reason usually is that the box had no top and the wrapping paper simply was not strong enough to hold the package together. In either event, those of you who do not use complete boxes incur the risk of having to reconstruct the contents if the Postal Service could not find all of the spilled documents. You also may receive from us an unsolicited photo of your handiwork. We furnish these for your staff judge advocate's office scrapbook of lessons learned.

Proof of Service

A critical part of posttrial appellate activity is notifying the accused of the Court of Military Review decision by serving on him or her a copy of the decision, and by advising the accused of his or her right to petition the United States Court of Military Appeals for review. These requirements are set forth in Rule for Courts-Martial 1203(d) and paragraph 13-9 of Army Regulation (AR) 27-10, Legal Services: Military Justice (22 Dec. 1989). If this is not done properly, the conviction never may become final and the punitive discharge, if adjudged, lawfully cannot be executed.

General court-martial (GCM) jurisdictions provide proof that service was made, which the Clerk of Court files with the original record of trial. The proof is a properly completed Department of the Army (DA) Form 4916-R, *see* AR 27-10 at 111, with any postal receipts and returned envelopes received.

When service is effected by mailing the decision and appellate rights advice to the accused's officially recorded address—as when the accused is on excess leave or is absent without authority (AWOL)—section C of DA Form 4916-R is used. Sections B and C both are used if the accused is AWOL. Department of the Army Message, DAJA-CL 011525Z May 91, directed GCM jurisdictions to alter the printed portion reading "was placed in military channels for delivery to the Postal Service to be dispatched 'Certified Mail'" to read "was placed in the Postal Service and dispatched 'Certified Mail.'" Until the printed form can be changed, this alteration must be made in all cases. This is particularly important because it may be the only evidence that the envelope was deposited in the United States mails, in compliance with UCMJ article 67(b)(2), if no receipt or

other material ever is returned to the staff judge advocate office. *See* DA Form 4916-R, sec. C, item 2c.

Posttrial Defense Delay and the Chronology Sheet, Again

Under Rules for Courts-Martial 1105(c)(1) and 1106(f)(5), twenty days is the maximum allowable extension of time to permit an accused to submit matters to the convening authority or to comment on the staff judge advocate's posttrial recommendation. Therefore, the statistical branch of the Clerk of Court's office monitors carefully any claimed deduction on the Chronology Sheet for a defense delay exceeding twenty days to see whether other factors mentioned in AR 27-10, paragraph 5-31*a.1*, are involved.

Too often, being able to support any posttrial deduction at all is impossible because the critical papers are undated. Staff judge advocates and their chiefs of military justice should review their posttrial formats to assure that forms being used to transmit the record of trial and the staff judge advocate's recommendation to the defense counsel include provisions for inserting the date. Equally important is that the form must require the defense counsel to insert the date of receipt. Finally, space should be provided for entering the date counsel's submissions or waiver were received in the staff judge advocate's office. Only in this way can delay attributable to the defense in excess of the ten days initially allowed be documented.

TJAGSA Practice Notes

Instructors, The Judge Advocate General's School

Criminal Law Notes

Prosecuting Juveniles as Adults in United States District Court: Some Practical Guidance

What options does a Special Assistant United States Attorney (SAUSA) have in prosecuting crimes committed by juveniles?[1] Minor misconduct, such as petty theft and vandalism, likely can be prosecuted by information in United States Magistrate's Court, although this court cannot impose a sentence to imprisonment on a juvenile.[2] More serious offenses committed by juveniles on military reservations may be prosecuted in United States district court but, even in this court, only limited imprisonment is possible.[3] When the juvenile offender is at least fifteen years old, however, and is alleged to have committed premeditated murder or to have acted as the leader of a drug-dealing gang on the local installation, a SAUSA should consider prosecuting him or her as an adult.

Normally, a federal prosecution against a juvenile begins with a criminal information.[4] The information should cite the juvenile delinquency provisions and the code section for the specific statute violated. The juvenile case should be captioned without referring to the true name of the defendant.[5] The information also must have attached a certification in writing[6] that no juvenile court of any state has jurisdiction over the juvenile or, if such jurisdiction exists, the respective state has refused to exercise it[7]. If the offense committed by the juvenile is a violent felony or a felony drug offense[8], then the certification also should state these particulars. Courtroom proceedings for juveniles are closed to the public.[9] If the juvenile is found guilty by the court,[10] the juvenile is adjudicated a "juvenile delinquent."[11] Sentencing is at a "dispositional hearing"[12] in which the *Sentencing Guidelines* do *not* apply.[13]

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[1] 18 U.S.C. § 5031 (1988) defines a juvenile as a person "who has not attained his eighteenth birthday." Criminal proceedings, however, may be commenced only against a juvenile who commits the offense prior to his 18th birthday *and* is charged with it before his 21st birthday.

[2] *Id.* § 3401(g) ("No term of imprisonment shall be imposed in any such case").

[3] This limited form of imprisonment is called "official detention" under 18 U.S.C. § 5037. Generally, if a juvenile offender is *less than* 18 years old, then any "official detention" may not exceed the person's 21st birthday. If, on the other hand, the juvenile is *between* 18 and 21 years of age, then any "official detention" cannot exceed five years. Several exceptions to this general rule exist, and 18 U.S.C. §§ 5037(c)(1) and 5037(c)(2) must be read carefully to calculate the correct sentence.

[4] Proceedings against a juvenile might begin with a "violation notice or complaint," particularly in United States magistrate's court. *See* 18 U.S.C. § 3401(g) (1988); Fed. R. Crim. P. 3. For juvenile proceedings generally, see United States Attorney's Manual, vol. III(a), § 9-8.000.

[5] Examples of appropriate captions are: "United States v. A Juvenile, Female"; or, in an information involving multiple defendants, "United States v. A Juvenile, Male; A Juvenile Male; A Juvenile, Female".

[6] The certificate required by 18 U.S.C. § 5032 usually is signed by the SAUSA for the United States attorney on the basis of authority delegated to the latter by the Attorney General under Order No. 579-74, 28 C.F.R. § 0.57 (1990). Note that *no* certification is required if the offense occurred within the special territorial jurisdiction of the United States and has a maximum term of imprisonment of less than six months.

[7] If a certification does not claim a lack of state court jurisdiction or refusal to exercise it as the reason for prosecuting a juvenile in United States district court, then section 5032 jurisdiction over a juvenile may be based on a felony offense if "a substantial Federal interest" that warrants the exercise of federal jurisdiction exists.

[8] 21 U.S.C. §§ 841, 952(a), 953, 955, 959, 960(b)(1), 960(b)(2), 960(b)(3) (1988).

[9] Note further that 18 U.S.C. §§ 5038(a) to 5038(c) prohibit unauthorized disclosure of juvenile records; 18 U.S.C. § 5038(e) forbids the publication of the name or picture of any juvenile involved in juvenile delinquency proceedings.

[10] A juvenile receives a bench trial only; no right to trial by jury exists. *See* 18 U.S.C. § 5037 (1988).

[11] *Id.* § 5032.

[12] *Id.*

[13] *See* United States Sentencing Commission, *Questions Most Frequently Asked About the Sentencing Guidelines*, vol. III, at 1.

Even if a juvenile prosecution is commenced in this normal manner, a SAUSA still can decide to proceed against the offender as an adult. Assuming that the local United States attorney agrees that prosecution as an adult is appropriate, the first step is to request permission from the United States Department of Justice (DOJ) to treat the juvenile as an adult.[14] A letter to the Chief, General Litigation,[15] at DOJ must detail the facts and circumstances supporting the request.

As an example, a recent request to DOJ to prosecute a seventeen-year-old juvenile as an adult was approved based on the following facts: During an interstate highway traffic stop, the seventeen-year-old male was found in possession of sixty-three packets of crack cocaine, a loaded .22 caliber pistol, and numerous rounds of ammunition. After his apprehension by the police, the juvenile male lied about his identity and his age; at his initial appearance before a United States magistrate, he persisted in these lies. The federal probation office later learned his true identity and date of birth. After discovering that he was not an adult, the juvenile was transferred by prison authorities to a juvenile detention facility, where he conspired with the other youths to overpower the staff and escape. When counselled by the staff, he attacked the staff and had to be handcuffed. A records check showed that this youth had been arrested at age fifteen on a gun charge in New York City. The United States attorney's letter to DOJ related all these facts and concluded that the juvenile's "proximity to the age of majority, the serious nature of the charges against him, the intelligence [about him] from local authorities, as well as his miserable attitude and behavior since his arrest, would seem to militate strongly in favor of treating him as an adult." DOJ approved the request to treat the juvenile as an adult.

The second step is to move the United States district court to transfer the juvenile to adult jurisdiction. A motion, captioned "Motion Requesting Defendant Be Transferred To Adult Jurisdiction," is made pursuant to 18 U.S.C. section 5032. The motion should detail all the facts that would support a prosecution of the juvenile as an adult. Section 5032 requires that

> [e]vidence of the following factors *shall* be considered, and *findings with regard to each factor shall be made in the record*, in assessing whether a transfer would be in the interest of justice:
>
> 1. the age and social background of the juvenile;
>
> 2. the nature of the alleged offense;
>
> 3. the extent and nature of the juvenile's prior delinquency record;
>
> 4. the juvenile's present intellectual development and psychological maturity;
>
> 5. the nature of past treatment efforts and the juvenile's response to such efforts;
>
> 6. the availability of programs designed to treat the juvenile's behavioral problems.[16]

Stating all facts that fit into any of the six listed categories in the government's motion is particularly important because the United States district court's required findings of fact—which likely will appear in a written "order" after the hearing—should be able to rely upon these factors in making the record.

The juvenile, as well as his or her parents, guardian or custodian, and counsel must receive notice of the request to transfer to adult jurisdiction.[17] In the hearing before the district court on the motion to transfer, any approved transfer of the juvenile to adult jurisdiction must be supported "with findings." The decision to allow a transfer is within the district court's discretion,[18] and the court need not weigh equally all the factors listed in 18 U.S.C. section 5032.[19] The *Federal Rules of Evidence* do not apply at the transfer hearing, and hearsay and other forms of evidence that are generally inadmissible at trial are admissible at the hearing.[20]

After the approved transfer of jurisdiction, the SAUSA must seek an indictment of the defendant as required for all adult offenders because prosecution on the basis of the juvenile information is no longer adequate.[21] After the return of a true bill, the case against the "juvenile" pro-

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[14] *See* United States Attorney's Manual, vol. III(a), § 9-2.143.

[15] Mr. Larry Lippe, Chief, General Litigation, P.O. Box 887, Ben Franklin Station, Washington, D.C. 20044.

[16] 18 U.S.C. § 5032 (1988) (emphasis added).

[17] *Id.*

[18] *See* United States v. Doe, 871 F.2d 1248 (5th Cir. 1989).

[19] *Id.* at 1252.

[20] United States v. H.S., 717 F. Supp. 911 (D.D.C. 1989).

[21] Unless the defendant consents to trial by information, a waiver of indictment must have been made. *See* Fed. R. Crim. P. 7(b).

ceeds as would any other prosecution against an adult offender—including a public trial by jury and sentencing under the *Sentencing Guidelines*. Major Borch.

Defense Counsel: An Ethical Duty to Investigate

In *United States v. Polk*[22] the United States Court of Military Appeals recently stated that defense counsel have "a duty to make reasonable investigations to determine what the true facts [of the case] are." The *Polk* case is important for the defense bar for at least two reasons: (1) the case reflects that counsel must have more than a mere belief that witness testimony will be untruthful before counsel elects not to present the testimony; and (2) the case implicitly undermines the defense counsel's tactic of intentionally avoiding learning the facts of a case to avoid suborning perjury.

In *Polk* the accused gave his defense counsel the names of witnesses, including the name of a coaccused, who the accused felt would offer exculpatory testimony. The defense counsel either did not talk to these witnesses or elected not to call them at trial.[23] One of the witnesses to whom the defense counsel did talk apparently would have testified that the victim had attempted to withdraw the charges, but this witness was not called at trial. Furthermore, defense counsel did not pursue the coaccused's testimony because he accepted the word of the coaccused's counsel that the coaccused would decline to testify at the accused's trial. In a posttrial affidavit, the defense counsel indicated, in a conclusory fashion, that he believed that the accused and coaccused had fabricated facts to exculpate themselves.[24] The defense counsel, moreover, did not dispute his alleged failure to explore the coaccused's expected testimony. Of interest is what the court said about the rationale given by the defense counsel:

> The reason given by defense counsel—"It was my belief at the time that these facts would not have been truthful"—is conclusory, self-serving and inadequate to justify his failure to do everything legally and ethically required to obtain the testimony of [the co-accused] and the other witnesses, provided the testimony proved to be helpful ... and was not demonstrably untruthful.[25]

The Army's ethical rules for attorneys state that an attorney may not offer false evidence knowingly and may refuse to offer evidence upon a reasonable belief that it is false.[26] While recognizing counsel's duty not to suborn perjury in *Polk*, the court found that the defense counsel's failure to pursue the investigation of the case—at least to the point of being able to provide articulable reasons for disbelieving his client—constituted ineffective assistance of counsel.[27]

The American Bar Association Standards for Criminal Justice (ABA Standards) also apply to defense counsel in the Army unless the specific standard is inconsistent with court-martial practice.[28] One standard states, "Defense counsel should conduct a prompt investigation of the circumstances of the case and explore all avenues leading to facts relevant to the merits of the case and penalty in the event of conviction."[29] This duty to investigate exists despite the accused's desire to plead guilty or despite any admissions by the accused indicating guilt.[30] The *Polk* case effectively mandates that military defense counsel comply with the ABA Standards regarding investigation of the case. Apparently, the court recognizes, as do the ABA Standards, that the facts of a case form the basis for counsel to provide effective representation. Another of the ABA Standards of which defense counsel should be aware is that "[a]s soon as practicable, defense counsel should seek to determine all relevant facts known to the accused."[31] In addition, counsel must not intimate that the client should not be candid in revealing the facts to the counsel "so as to afford defense counsel free rein to take action which would be precluded by counsel's knowing of such facts."[32]

These rules and standards lend support to the proposition that defense counsel are officers of the court and owe a duty not only to their clients, but also to the overall justice system. While the role of a defense counsel must be balanced between these two duties, defense counsel should recognize that either one or both of the duties will be compromised unless counsel have investigated the facts of the case. The Supreme Court has stated, "counsel have a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary ... [A] particular decision not to investigate

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[22] 32 M.J. 150, 153 (C.M.A. 1991).

[23] *Id.* at 152.

[24] *Id.*

[25] *Id.* at 153.

[26] Dep't of Army, Pam. 27-26, Rules of Professional Conduct for Lawyers, rules 3.3(a)(4), 3.3(c) (31 Dec. 1987).

[27] *Polk*, 32 M.J. at 153.

[28] Army Reg. 27-10, Legal Services: Military Justice, para. 5-8 (22 Dec. 1989).

[29] Standards for Criminal Justice, The Defense Function, Standard 4-4.1 (1991) [hereinafter ABA Standards].

[30] *Id.*

[31] ABA Standard 4-3.2(a).

[32] *Id.* 4-3.2(b).

must be directly assessed for reasonableness."[33] *Polk* forcefully drives this lesson home to military defense counsel. Defense counsel must either investigate the facts of a case or have good reasons for not doing so. Otherwise, counsel risk being faulted—both in the legal sense, for providing ineffective assistance of counsel and in the ethical sense for being incompetent. Lieutenant Colonel Holland.

Improper Use of Prior Inconsistent Statements

Consider the common situation in which a potential witness has told friends that he observed the accused commit the charged crime. Because of doubts concerning his future well-being, however, the witness now informs the prosecutor that he will testify that the accused is innocent. Accordingly, the prosecutor begins to consider creative ways to admit the earlier statement of the accused's guilt.

In the government's case-in-chief, an astute defense counsel successfully would challenge the admissibility of the earlier statement as hearsay—that is, an out-of-court statement offered for the truth of the matter asserted.[34] If the defense were to have the witness testify at trial on the accused's innocence, however, the prosecutor could then admit the prior inconsistent statement as an exemption to the hearsay rule.[35] Consequently, the prudent defense counsel may choose not to call the witness.

If the defense counsel actually chooses not to call the witness, a creative prosecutor may attempt to use the rule that allows a party to impeach any witness, including one's own witness.[36] In other words, why not call the witness as a prosecution witness, let him testify to the accused's innocence, and then impeach him with his prior inconsistent statement? Would not the factfinder now consider the earlier statement against the accused in determining guilt?

In answering these questions, counsel must distinguish between the two permissible uses of prior inconsistent statements. If counsel is interested in presenting the substance of the prior statement, the hearsay problem must be overcome. The rules only exempt from hearsay prohibitions sworn statements made at a trial, hearing, deposition, or similar types legal proceedings.[37] The statement of the witness to friends does not meet this requirement and cannot be considered as substantive evidence. For impeachment purposes, however, the proponent can prove any prior inconsistent statement as long as the opposing party is afforded an opportunity to cross-examine the witness and the witness is given an opportunity to explain the apparent inconsistency.[38]

Faced with a prosecutor who used the tactic described above, the Ninth Circuit recently explained that the prosecutor had used the impeachment rule impermissibly to gain substantive use of a prior inconsistent statement.[39] The maximum permissible effect of impeachment is to cancel out adverse testimony. To go further and invite the factfinder's consideration of the evidence substantively—that is, for a purpose other than the purpose for which it was admitted—amounts to a bad-faith "end run" around the rules of evidence.

When a prior inconsistent statement is admitted to impeach a witness, the adversely affected party should consider requesting an immediate instruction that the evidence is to be considered only for the purpose of evaluating credibility, and not for the purpose of establishing the truth of the statement's content.[40] Counsel also must be careful not to argue the contents of a statement admitted solely for impeachment purposes for any reason other than evaluating the believability of the witness. Major Warner.

Dereliction of Duty and the Defense of Ineptitude

Dereliction of duty[41] is a uniquely military offense.[42] The 1984 Manual for Courts-Martial[43] instructs that the crime has the following three elements of proof:

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[33] Strickland v. Washington, 466 U.S. 668, 691 (1984).

[34] *See* Manual for Courts-Martial, United States, 1984, Mil. R. Evid. 801(c) [hereinafter Mil. R. Evid.].

[35] *Id.* 801(d)(1)(A).

[36] *Id.* 607.

[37] *Id.* 801(d)(1)(A).

[38] *Id.* 613(b).

[39] United States v. Gomez-Gallardo, 915 F.2d 553 (9th Cir. 1990); *see also* United States v. Jackson, 12 M.J. 163 (C.M.A. 1981); United States v. Mendoza, 18 M.J. 576 (A.F.C.M.R. 1984).

[40] *See* Department of Army, Pam 27-9, Military Judges' Benchbook, para. 7-11 (1 May 1982) [hereinafter Benchbook].

[41] *See* Uniform Code of Military Justice art. 92(3), 10 U.S.C. § 892(3) (1982) [hereinafter UCMJ].

[42] As the author once observed:

> Although willfully or negligently poor job performance by a civilian worker may be grounds for terminating employment or taking other adverse administrative actions against the worker, rarely would such job related conduct serve as a basis for using criminal sanctions. Military law, on the other hand, provides that dereliction of duty, even if unintentional, can result in a criminal conviction and imprisonment.

TJAGSA Practice Note, *Dereliction of Duty and Weather Reports*, The Army Lawyer, Oct. 1990, at 41-42 (footnotes omitted).

[43] Manual for Courts-Martial, United States, 1984 [hereinafter MCM, 1984].

(1) That the accused had certain duties;[44]

(2) That the accused had knowledge of the duties;[45] and

(3) That the accused, either willfully,[46] though neglect,[47] or by culpable inefficiency,[48] was derelict in the performance of those duties.[49]

Mere ineptitude, on the other hand, will not support a conviction for dereliction of duty.[50] This principle of military law has come to be known as the "ineptitude defense."[51] As the Manual for Courts-Martial explains:

> A person is not derelict in the performance of duties if the failure to perform those duties is caused by ineptitude rather than by willfulness, negligence, or culpable inefficiency, and may not be charged under this article, or otherwise punished. For example, a recruit who has tried earnestly during rifle training and throughout record firing is not derelict in the performance of duties if the recruit fails to qualify with the weapon.[52]

In the recent case of *United States v. Powell*,[53] the accused, contrary to his pleas, was convicted of four of eleven specifications of dereliction of duty.[54] Three of the convictions pertained to the accused's duties regarding official reports.[55] Specifically, the specifications alleged, respectively, that the accused: (1) willfully allowed a nonwitness to sign a report as a witness; (2) willfully signed reports stating that materials were destroyed before they actually were destroyed; and (3) was culpably inefficient in failing altogether to sign a report.[56] The final conviction related to the accused's culpable inefficiency by completely failing to keep a running inventory.

The defense in *Powell* argued on appeal that the accused was entitled to the defense of ineptitude.[57] The defense contended that the accused lacked the skill, training, and command support to perform his duties with respect to the reports properly.[58]

The Court of Military Appeals disagreed. The court initially observed that the ineptitude defense "is largely fact-specific, requiring consideration of the duty imposed, the abilities and training of the soldier upon whom the duty is imposed, and the circumstances in which he is called upon to perform this duty."[59] With respect to the specifications relating to the reports, the court found that the accused's derelictions "were caused by a lack of simple integrity rather than ineptitude."[60] On the remaining specification, the court emphasized the accused's complete failure to keep a running inventory, as opposed to

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[44] The potential sources of the duty that can serve as the basis for a conviction under article 92(3) are virtually limitless. The Manual explains that the "duty may be imposed by treaty, statute, regulation, lawful order, standard operating procedure, or custom of the service." *Id.*, Part IV, para. 16c(3)(a); *see, e.g.*, United States v. Nichels, 20 M.J. 225 (C.M.A. 1985) (Air Force regulation imposes a duty upon the accused, a fund custodian, to audit funds periodically and to maintain proper fiscal control over them); United States v. Moore, 21 C.M.R. 544, 546 (N.B.R. 1956) (accused's duty to return to his ship under the circumstances was imposed by a Navy Regulation); United States v. Heyward, 22 M.J. 35 (C.M.A. 1986) (a custom of the service, in addition to an Air Force regulation, imposed a duty upon the accused, a noncommissioned officer, to report drug abuse by others).

[45] In contrast, the Manual for Courts-Martial, United States, 1969, para. 172*c* (Rev. ed.) [hereinafter MCM, 1969] provided that actual knowledge was required only for willful dereliction of duties. The drafters of the 1984 Manual for Courts-Martial, relying on United States v. Curtin, 26 C.M.R. 207 (C.M.A. 1958), have made the accused's knowledge of the duties a requirement for all derelictions, including derelictions based upon negligence and culpable inefficiency. *See* MCM, 1984, Part IV, para. 16c analysis, app. 21, at A21-89.

[46] Dereliction of duty may be willful. When used in this context, "willful" means "intentional" and "refers to the doing of an act knowingly and purposely, specifically intending the natural and probable consequences of the act." MCM, 1984, Part IV, para. 16c(3)(c).

[47] Dereliction of duty may be negligent. The Manual for Courts-Martial defines "negligent" as meaning that the "act or omission [was made by] a person who is under a duty to use due care [but] exhibits a lack of that degree of care which a reasonably prudent person would have exercised under the same or similar circumstances." MCM, 1984, Part IV, para. 16c(3)(c); *see* United States v. Kelchner, 36 C.M.R. 183, 185 (C.M.A. 1966); United States v. Ferguson, 12 C.M.R. 570, 576 (A.B.R. 1953); *e.g.*, United States v. Grow, 11 C.M.R. 77, 86-87 (C.M.A. 1953) (accused derelict in his duty by failing to safeguard classified information adequately); United States v. Sievert, 29 C.M.R. 657, 661-62 (N.B.R. 1959) (accused, a navigator, found derelict in his duties by running his ship aground because he failed to use all the available equipment and to regularly check his position while trying maneuver through a narrow passage on a dark night).

[48] Dereliction of duty may be based on culpable inefficiency. The Manual for Courts-Martial defines "culpable inefficiency" as being "inefficiency for which there is no reasonable or just excuse." MCM, 1984, Part IV, para. 16c(3)(c); *see, e.g.*, United States v. Dellarosa, 30 M.J. 255 (C.M.A. 1990) (accused was derelict in his duties by being culpably inefficient in making weather reports); *Nickels*, 20 M.J. 225 (C.M.A. 1985) (accused was derelict in his duties, apparently under a culpable inefficiency theory, with respect to auditing and controlling postal funds).

[49] MCM, 1984, Part IV, para. 16b(3).

[50] *See Kelchner*, 36 C.M.R. at 185.

[51] Technically, this is a proper characterization of the way an accused's ineptitude will operate with respect to dereliction of duty. Ineptitude, in essence, negates the *mens rea* (willfulness, negligence, or culpable inefficiency) required for the offense. Thus, it serves as a failure of proof defense. *See generally* Milhizer, *Voluntary Intoxication as a Criminal Defense Under Military Law*, 127 Mil. L. Rev. 131, 147 n.93 (1990).

[52] MCM, 1984, Part IV, para. 16c(3)(d). For other illustrative examples of ineptitude, see Manual for Courts-Martial, United States, 1951, para. 171*c*.

[53] 32 M.J. 117 (C.M.A. 1991).

[54] *Id.* at 117.

[55] *Id.* at 118.

[56] *Id.*

[57] *Id.* at 117-18.

[58] *Id.* at 121.

[59] *Id.*

[60] *Id.* The court wrote in this regard that "[a]n officer's word is his bond; and, in the circumstances of this case, there was no excuse for an officer [the accused was a first lieutenant] knowingly signing false reports or allowing the same to be signed by others." *Id.*

an inaccurate or incomplete inventory.[61] The court therefore concluded that the military judge's rejection of the defense of ineptitude, at least as to the four specifications of which the accused was convicted, was not legal error requiring reversal.[62]

As with any fact-dispositive legal issue, the ineptitude defense necessarily requires the drawing of fine distinctions.[63] With this in mind, practitioners should become familiar with *Powell* and the guidance it provides. Major Milhizer.

Distributing Drugs by Federal Express

Article 112a of the Uniform Code of Military Justice[64] (UCMJ) proscribes, *inter alia*, wrongful distribution of a controlled substance. The 1984 Manual for Courts-Martial definition of distribution is extremely broad: "'Distribute' means to deliver to the possession of another. 'Deliver' means the actual, constructive, or attempted transfer of an item, whether or not there exists an agency relationship."[65]

The military's courts have, in turn, expansively interpreted this broad definition of distribution. The Court of Military Appeals, for example, has held that distribution can occur even if the accused intended to reclaim the drugs before they went into commerce and the recipient was unaware of the presence of the drugs.[66] Military courts also have concluded that distribution can consist of passing drugs from one coconspirator to another,[67] or by the accused's passing them back to the original supplier.[68] Even the so-called *Swiderski* exception,[69] which has been recognized by the military's courts in dicta,[70] always has been distinguished on the facts and disallowed.[71] "Distribution" actually has become a legal term of art that sometimes has been given a surprisingly broad definition.[72]

United States v. Lorenc[73] is the most recent reported military case to address the scope of conduct embraced by the term "distribution." A witness at Lorenc's court-martial testified that he saw the accused wrap some ecstacy[74] in paper and tin foil, place it in an envelope, and then send it off by Federal Express.[75] The witness did not know the identity of the recipient or how the envelope was addressed.[76]

The Air Force Court of Military Review in *Lorenc* had little trouble concluding that the accused's conduct constituted wrongful distribution of ecstacy. The court, after referring to the Manual for Courts-Martial definition of distribution, observed that "'[d]istribute' or 'distribution' are not generally considered narrowly-defined words of legalese."[77] Applying this authority, the court wrote that it was "confident ... that dispatching ecstacy via Federal Express amounts to distribution under the Manual definition."[78]

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[61] *Id.*

[62] *Id.* (citing United States v. Hart, 25 M.J. 143 (C.M.A. 1987), *cert. denied*, 488 U.S. 830 (1988)).

[63] As Justice Oliver Wendell Holmes once observed in a different context:

> [W]hile I should not dream of asking where the line can be drawn, since the great body of the law consists in drawing such lines, yet when you realize that you are dealing with a matter of degree you must realize that reasonable men may differ widely as to the place where the line should fall.

Schlesinger v. Wisconsin, 270 U.S. 230, 241 (1926).

[64] UCMJ art. 112a.

[65] MCM, 1984, Part IV, para. 37c(3). The same broad language was used in the revised version of the previous Manual. *See* MCM, 1969, para. 213*g*; United States v. Brown, 19 M.J. 63, 64 (C.M.A. 1984).

[66] United States v. Sorrell, 23 M.J. 122 (C.M.A. 1986).

[67] United States v. Tuero, 26 M.J. 106 (C.M.A. 1988); *see* United States v. Figueroa, 28 M.J. 580 (N.M.C.M.R. 1989).

[68] United States v. Herring, 31 M.J. 637 (N.M.C.M.R. 1990).

[69] United States v. Swiderski, 548 F.2d 445 (2d Cir. 1977) (when two individuals simultaneously and jointly acquire possession of a drug for their own personal use, intending to share it together, their only crime is wrongful possession or use; they are not guilty of aiding and abetting the distribution to each other).

[70] *E.g.*, United States v. Hill, 25 M.J. 411 (C.M.A. 1988).

[71] *E.g.*, *id.*; United States v. Viser, 27 M.J. 562 (A.C.M.R. 1988); United States v. Allen, 22 M.J. 512 (A.C.M.R. 1986).

[72] *E.g.*, United States v. Omick, 30 M.J. 1122 (N.C.M.R. 1989) (distribution can occur without a physical transfer of the drug). *See generally* TJAGSA Practice Note, *Does Drug Distribution Require Physical Transfer?*, The Army Lawyer, Nov. 1990, at 44. The military's courts have recognized that the term distribution has some limits. For example, wrongful distribution did not occur when drugs were transferred between government agents, and the accused neither ratified the sale nor accepted the proceeds therefrom. United States v. Bretz, 19 M.J. 224, 227-28 (C.M.A. 1985). *See generally* United States v. Dayton, 29 M.J. 6 (C.M.A. 1989).

[73] 32 M.J. 660 (A.F.C.M.R. 1991).

[74] Ecstacy is a common name given to MDMA, a Schedule I controlled substance. *Id.* at 661 (citing United States v. Reichenbach, 29 M.J. 128 (C.M.A. 1989)).

[75] *Lorenc*, 32 M.J. at 661, 663.

[76] *Id.* at 663.

[77] *Id.* at 663 n.7 (citing 27 C.J.S. Distribution 614 (1959)).

[78] *Id.* at 663. In support of this conclusion, the court cited State v. McHorse, 85 N.M. 753, 517 P.2d 75 (N.M. Ct. App. 1978), which held that placing a controlled substance in the mails constituted distribution within the statutory meaning of wrongful distribution of controlled substances because this conduct had the effect of turning the drugs over to an agent for delivery and thereby amounted to constructive transfer.

In reaching its conclusion that distribution had occurred, the *Lorenc* court explained that "[w]e see no suggestion that Lorenc was simply sidestepping immediate danger by mailing the ecstasy back to himself."[79] This observation implies too much. An accused's conduct can amount to distribution within the scope of article 112a even when he or she temporarily surrenders possession of a controlled substance for the sole purpose of avoiding detection.[80] These actions constitute distribution because the accused has delivered possession of the drug to another—in Lorenc's case, to employees of Federal Express. The accused's intent to retrieve the drugs for his personal use, rather than intending that they be used by another, might serve as a matter in extenuation or mitigation.[81] The conduct, nevertheless, constitutes distribution as defined by article 112a. Major Milhizer.

Self-Defense Not Raised by Prior Incident

Introduction

United States v. Reid[82] is the most recent case in which the Court of Military Appeals has considered and applied the special defense of self-defense. Before discussing *Reid* in detail, a brief review of self-defense under military law generally is appropriate.[83]

Self-Defense Generally

Self-defense long has been recognized under the common law.[84] Case authority explicitly allowing the defense dates back at least to the early thirteenth century.[85] In addition, the Supreme Court historically has permitted self-defense to act as a complete defense to most violent crimes.[86] Presently, "[e]very American jurisdiction provides a justification of self-defense in one form or another."[87] The Model Penal Code also recognizes self-defense.[88]

Military law likewise has recognized the defense of self-defense.[89] Under present military law, self-defense is included in the 1984 Manual for Courts-Martial as one of several expressly named special defenses.[90] Self-defense justifies the use of proportional, defensive force to protect oneself from physical harm. The degree of force used to defend against an attack must be proportional to the severity and certainty of the perceived attack to constitute self-defense.[91]

Virtually every formulation of self-defense, including the defense under military law, requires that the accused satisfy the following two elements: (1) the accused *reasonably* must believe that he or she is in immediate danger of receiving unlawful bodily harm;[92] and (2) the

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[79] *Lorenc*, 32 M.J. at 663.

[80] *See Sorrell*, 23 M.J. at 122.

[81] *See generally* Manual for Courts-Martial, United States, 1984, Rules for Courts-Martial [hereinafter R.C.M.] 1001(c)(1)(A), 1001(c)(1)(B).

[82] 32 M.J. 146 (C.M.A. 1991).

[83] Much of resource material for this note is taken from Criminal Law Division, The Judge Advocate General's School, U.S. Army, Criminal Law Deskbook, Crimes and Defenses 3-12 to 3-14 (Aug. 1990). Persons interested in obtaining a copy of this deskbook can order it through the Defense Technical Information Center. The procedures for ordering the deskbook are found in the Current Material of Interest section of *The Army Lawyer*. The contributions of Major Thomas O. Mason are also gratefully acknowledged.

[84] *See generally* Beale, *Retreat from a Murderous Assault*, 16 Harv. L. Rev. 567 (1903); Beale, *Homicide in Self-Defence*, 3 Colum. L. Rev. 526 (1903); Perkins, *Self-Defense Re-examined*, 1 U.C.L.A. L. Rev. 133 (1954). The English common law placed major emphasis upon crime prevention and law enforcement with respect to the privilege of using deadly force. Modern statutes and decisional law have instead focused upon self-defense and defense of another. *See* R. Perkins & R. Boyce, Criminal Law 1143 (3d ed. 1982). Under the modern view, self-defense acts as a justification defense; it justifies the use of force to avoid a greater harm or further a societal interest. Milhizer, *supra* note 51, at 147 n.95.

[85] *E.g.*, The Case of Robert of Herthale, 1 Selden Society Select Pleas of the Crown 31 (1203); *see also* The Case of Leonin and Jacob, 1 *id.* at 85 (1221); The Case of the Carter, 1 *id.* at 94 (1221); Anonymous, Fitzherbert, Grand Abridgement, C. and P.L. No. 284 (1328). A declarative statute first was enacted in the mid-sixteenth century. 24 Hale VIII, c.5 (1532). The first analytical treatment of self-defense was by Sir Michael Foster in 1762. Foster, Crown Law (1762). A good summary of the development of the defense, from which the above-cited authorities are taken, is found in R. Perkins & R. Boyce, *supra* note 84, at 1120-27.

[86] *E.g.*, Beard v. United States, 158 U.S. 550 (1895); Acers v. United States, 164 U.S. 388 (1896); Rowe v. United States, 164 U.S. 546 (1896); Brown v. United States, 256 U.S. 335 (1921).

[87] 2 P. Robinson, Criminal Law Defenses 96 (1984); *see also id.* at 96-97 n.1 (lists statutory provisions relating to self-defense). *See generally* W. LaFave & A. Scott, Handbook on Criminal Law § 53 (1972) [hereinafter *Handbook*]; W. LaFave & A. Scott, Substantive Criminal Law sec. 5.7 (1986) [hereinafter *Criminal Law*]; R. Perkins & R. Boyce, *supra* note 84, at 1113-44.

[88] Model Penal Code § 3.04 (proposed Official Draft 1962).

[89] *See generally* United States v. Amdahl, 2 C.M.R. 406, 414 (A.B.R. 1952), and the cases cited therein.

[90] R.C.M. 916(e).

[91] *See* United States v. Vaughn, 36 C.M.R. 120, 125-26 (C.M.A. 1966); *see also* United States v. Gordon, 34 C.M.R. 94 (C.M.A. 1963); United States v. Straub, 30 C.M.R. 156, 160 (C.M.A. 1961). *See generally* 2 P. Robinson, *supra* note 87, at § 131(a). Therefore, an accused may respond to a "fistic" assault with similar force. United States v. Perry, 36 C.M.R. 377, 380 (C.M.A. 1966). "Of course, one who has been attacked is not restricted to defending himself to the precise force threatened by the assailant." United States v. Cardwell, 15 M.J. 124, 126 n.2 (C.M.A. 1983) (citing United States v. Acosta-Vergus, 32 C.M.R. 388, 392 (C.M.A. 1962)).

[92] W. LaFave & A. Scott, *Criminal Law*, *supra* note 87, at 649. As noted by other commentators, "[t]he test ... is not ... the actuality of the impending harm ... [but instead t]he reasonable belief of the defender is controlling." R. Perkins & R. Boyce, *supra* note 84, at 1115.

accused's use of force *subjectively* must be necessary to avoid the impending bodily harm, without being excessive.[93] When these requirements are met, self-defense will operate as a complete defense to crimes against a person such as murder, manslaughter, maiming, and assault.[94]

As with all defenses under military law, the accused has the burden of production—that is, placing self-defense in issue by proffering some evidence.[95] Self-defense can be raised[96] by evidence presented by the defense, the prosecution, or the court-martial.[97] In addition, the military judge has a sua sponte duty to instruct upon self-defense when it reasonably has been raised by the evidence.[98] Once put in issue, however, the prosecution has the burden of proving beyond a reasonable doubt that the defense of self-defense did not exist.[99] Contrary to the general rule of military practice permitting inconsistent defenses,[100] case law holds that an accused may not raise self-defense while denying that he committed the crime.[101]

Self-defense most often is raised when injury or death is inflicted by the accused.[102] In these circumstances, an accused may interpose self-defense to a charge of homicide or aggravated assault provided that: (1) he or she reasonably apprehended suffering death or grievous bodily harm; and (2) he or she believed the force used in response was necessary to protect against the reasonably perceived threat.[103] Similarly, an accused may interpose self-defense to any charged assault provided that: (1) he or she reasonably apprehended bodily harm was about to be inflicted upon him or her; and (2) he or she responded with nondeadly force necessary to repel the attack.[104]

As the above discussion indicates, the accused's apprehension of receiving immediate bodily harm is judged by an objective standard. Accordingly, the apprehension must be one that a reasonably prudent person would have held under the circumstances.[105] Matters such as the relative height, weight, and general build of the parties, as well as the possibility of safe retreat, may be considered in determining whether the accused's apprehension was reasonable.[106] Other facts, however, such as the accused's intoxication and emotional stability, are not relevant to this objective assessment.[107]

The necessity of the accused's response is judged by a subjective standard. Although the accused's apprehension must be reasonable, the force he or she used in response

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[93] W. LaFave & A. Scott, *Criminal Law*, *supra* note 87, at 649; *see* R. Perkins & R. Boyce, *supra* note 84, at 1115. Depending on the circumstances, an accused may resort to a deadly weapon to repel a simple assault. United States v. Black, 31 C.M.R. 157, 161 (C.M.A. 1961).

[94] W. LaFave & A. Scott, *Handbook*, *supra* note 87, at 391. Some commentators have suggested that self-defense can be a defense for other types of offenses, such as crimes against property, in appropriate cases. For example, a person could use self-defense to justify taking a car to flee from an unwarranted attack. *See* Hall & Mueller, Criminal Law and Procedure 663 (2d ed. 1965). This example more accurately raises the defense of necessity. *See generally* Milhizer, *Necessity and the Military Justice System: A Proposed Special Defense*, 121 Mil. L. Rev. 95 (1988).

[95] R.C.M. 916(b). This is consistent with civilian jurisdictions, which always place the burden of production on the defense. 2 P. Robinson, *supra* note 87, at 99.

[96] This burden sometimes is described as the burden of raising the defense. *See* United States v. Hurst, 49 C.M.R. 681, 682 (A.C.M.R. 1974).

[97] R.C.M. 916(b) discussion; *see* United States v. Rose, 28 M.J. 132 (C.M.A. 1989). *See generally* TJAGSA Practice Note, *Self-Defense Need Not Be Raised by the Accused's Testimony*, The Army Lawyer, Aug. 1989, at 40.

[98] R.C.M. 920(e); *see Vaughn*, 36 C.M.R. at 124 ("[I]f there is evidence in the record which, if believed, could raise a doubt whether the accused acted in self-defense, then the issue is reasonably raised and instructions must be given thereon."); *Gordon*, 34 C.M.R. at 100-01; *Black*, 31 C.M.R. at 160; *see also* Benchbook, para. 5-2 (military's self-defense instruction).

[99] R.C.M. 916(b); *see Gordon*, 34 C.M.R. at 101. *See generally* United States v. Lincoln, 38 C.M.R. 128 (C.M.A. 1967) (government must prove beyond a reasonable doubt that a special defense does not apply). This allocation of the burden and standard of proof is consistent with most civilian jurisdictions, which place the burden of persuasion on the prosecution, beyond a reasonable doubt. 2 P. Robinson, *supra* note 87, at 99-100.

[100] R.C.M. 916(b) discussion; *e.g.*, *Lincoln*, 38 C.M.R. 128 (C.M.A. 1967) (both accident and self-defense can be raised); United States v. Snyder, 21 C.M.R. 14 (C.M.A. 1956) (both heat of passion and self-defense can be raised).

[101] United States v. Bellamy, 47 C.M.R. 319 (A.C.M.R. 1973); *cf.* United States v. Crabtree, 32 C.M.R. 652 (A.B.R. 1962) (both duress and denial may not be raised).

[102] Preventive self-defense, although less common, also is recognized under military law. Preventive self-defense is established by demonstrating two conditions: (1) the accused apprehended, on reasonable grounds, that bodily harm was about to be inflicted upon him wrongfully; and (2) to deter the assailant, the accused offered, but actually did not apply or attempt to apply, a means or force that would be likely to cause death or grievous bodily harm. R.C.M. 916(e)(2). Accordingly, under the rubric of preventative self-defense, an accused may offer an aggravated assault to deter a simple battery. *Acosta-Vargus*, 32 C.M.R. at 392-93; United States v. Lett, 9 M.J. 602, 604 (A.F.C.M.R. 1979), *pet. denied*, 9 M.J. 414 (C.M.A. 1980) (accused pulled a knife to deter a battery); United States v. Johnson, 25 C.M.R. 554 (A.B.R. 1957) (accused fired pistol, intentionally missing his attacker, to deter a simple assault). A detailed discussion of preventative self-defense is beyond the scope of this note.

[103] R.C.M. 916(e)(1); United States v. Jackson, 36 C.M.R. 101 (C.M.A. 1966); United States v. Clayborne, 7 M.J. 528 (A.C.M.R. 1979). Accordingly, an accused justifiably may use deadly force against another in self-defense if he or she reasonably believes that the other person is about to inflict unlawful death or serious bodily harm upon him or her and that deadly force is needed to prevent it. *Beard*, 158 U.S. at 560; *see* W. LaFave & A. Scott, *Handbook*, *supra* note 87, at 393.

[104] R.C.M. 916(e)(3); United States v. Jones, 3 M.J. 279, 280 (C.M.A. 1979).

[105] *See Jackson*, 36 C.M.R. at 106 (accused's apprehension was not reasonable; a reasonably prudent person would not fear death or grievous bodily harm by a slap in face).

[106] R.C.M. 916(e)(1) discussion; *see Clayborne*, 7 M.J. at 531 (the accused's use of a knife constituted self-defense when the attacker was an experienced boxer with a reputation for violence and the accused could not retreat).

[107] R.C.M. 916(e)(1) discussion; United States v. Judkins, 34 C.M.R. 232, 239-41 (C.M.A. 1964); Springfield v. State, 96 Ala. 81, 11 So. 250 (1892); W. LaFave & A. Scott, *Handbook*, *supra* note 87, at 394.

to that apprehension need be necessary only in his or her own mind.[108] Accordingly, the accused's age, intelligence, education, and training are all relevant in assessing his or her subjective belief regarding the force necessary to repel the attack.[109] Likewise, the accused's level of intoxication and emotional stability may be considered in determining whether the force he or she used was subjectively necessary.[110]

The Case of United States v. Reid

The accused in *Reid* was charged, *inter alia*, with two assaults consummated by a battery upon his wife.[111] He was acquitted of the first assault, which allegedly occurred in November 1987, and was convicted of the second assault, which occurred in July 1988.[112]

On the first occasion, the accused was charged with slapping his wife with an open hand.[113] The incident arose when the accused's wife learned of his romantic relationship with another woman. Although the accused apparently did not deny striking his wife, he successfully interposed the defense of self-defense.[114] The relevant evidence showed that before the accused slapped his wife, she repeatedly had hit him in the face, pushed him into a swimming pool, and bit him on the nose.[115] After the physical altercation,[116] the wife obtained a pistol and threatened to "blow" the accused's "head off."[117]

The second incident grew out of an argument between the accused and his wife.[118] The accused, having become enraged at a comment made by his wife, began to leave while taking his wife's car keys with him. She complained and grabbed the accused's wrist. The accused, saying that he could not "take any more," picked his wife up and threw her "over his body and down his back."[119] She landed with a "full blast" on a concrete driveway.[120] When she attempted to get up, the accused again threw her hard to the ground.

The defense did not request a self-defense instruction at the court-martial for this latter offense. On appeal, the defense nevertheless argued that the wife's actions on the earlier occasion in November—including both her aggressive physical contact with the accused and her threats to him with a pistol—could have caused the accused to believe that he was in danger of great bodily harm during the July 1988 altercation. Accordingly, the defense contended that the military judge failed in his sua sponte duty to instruct upon self-defense because it was raised by the evidence.

The Court of Military Appeals disagreed. The court first observed that the record contained no evidence that the accused's wife was about to engage in any acts similar to the acts she performed on the first occasion. The court also concluded that even if self-defense somehow was raised as to the first "body slam" because of the wife's behavior some eight months earlier, it clearly was not at issue with respect to the second incident. Because the members could have convicted the accused, as charged, on the basis of the second violent act alone, the military judge did not err in failing to instruct upon self-defense.

Conclusion

Reid is useful in illustrating the bifurcated analysis required to evaluate claims of self-defense. Even assuming that the accused's actions were, in his subjective view, necessary to avoid being harmed, they were not made in response to an objectively reasonable belief on his part that he was in immediate danger of receiving unlawful bodily harm. Therefore, the accused failed to satisfy the first element of self-defense.

In concluding that the accused was not entitled to self-defense, the Court of Military Appeals in *Reid* was careful not to base its decision upon the relative credibility of controverted evidence. Instead, the court correctly considered the evidence in the light most favorable to the accused in determining whether the defense was raised. The credibility of evidence pertaining to any defense is a

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[108] *Clayborne*, 7 M.J. at 531.

[109] R.C.M. 916(e)(1) discussion; *see Jackson*, 36 C.M.R. 101 (C.M.A. 1966).

[110] *See Judkins*, 34 C.M.R. 232 (C.M.A. 1964).

[111] *Reid*, 32 M.J. at 146.

[112] *Id.* at 147-48.

[113] *Id.* at 147.

[114] The military judge instructed the members that self-defense should be considered in connection with this charge. *Id.* at 147 n.2. The members, of course, did not enter special findings.

[115] *Id.* at 148.

[116] The accused also pushed his wife into the swimming pool. *Id.*

[117] *Id.*

[118] *Id.* at 147.

[119] *Id.*

[120] *Id.*

matter for the fact-finder to weigh; doubts about whether an instruction is required should be resolved in favor of the accused.[121] Because no reasonable doubt existed in *Reid*, an instruction on self-defense was unwarranted.

Finally, *Reid* illustrates the importance of the military judge's sua sponte duty to instruct upon all relevant special defenses. Judges must be alert to situations in which these defenses arguably are raised by the evidence but are not requested by defense counsel. Moreover, trial counsel should bring to the attention of the military judge and defense counsel—probably during the article 39(a) session on instructions[122]—any special defenses that arguably are raised, but not requested. In doing so, trial counsel both serves the interests of justice and protects the record. Major Milhizer.

Horseplay Is Not Disorderly Conduct

The accused in *United States v. Alford*[123] was convicted, *inter alia*, of disorderly conduct.[124] The incident occurred at a confinement facility in which the accused was a posttrial prisoner.[125] According to a guard, he was monitoring a closed-circuit television when he saw the accused and another prisoner apparently involved in "a pushing and shoving match which [was] disruptive."[126] The guard testified that he later realized the prisoners merely were racing to be first in line for food. During his testimony, the guard characterized the accused's conduct as "horseplay." The guard and a defense witness, another guard, both acknowledged that this type of horseplay frequently occurred at the confinement facility.

Because disorderly conduct is proscribed under the general article, it does not have explicit statutory elements of proof.[127] The 1984 Manual for Courts-Martial includes "Disorderly conduct, drunkenness" as an enumerated article 134 offense having the following two elements of proof:

> (1) That the accused was drunk, disorderly, or drunk and disorderly on board ship or in some other place; and
>
> (2) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.[128]

The Manual provides further that

> Disorderly conduct is conduct of such a nature as to affect the peace and quiet of persons who may witness it and who may be disturbed or provoked to resentment thereby. It includes conduct that endangers public morals or outrages public decency and any disturbance of a contentious or turbulent character.[129]

This definition of "disorderly conduct" is based upon military decisional law.[130]

Applying this guidance, the court in *Alford* concluded that the accused's actions did not amount to disorderly conduct under article 134. The court wrote that "horseplay between two prisoners trying to be the first to the front of a chow line does not meet the definition of a 'disturbance of a contentious or turbulent character' that is prejudicial to good order and discipline."[131] The court explained further that even if the accused's conduct violated the internal rules of the confinement facility,[132] it did not rise to the level of disorderly conduct that is proscribed as a criminal offense.

The court also correctly instructed that the prison guard's characterization of the incident as a "disturbance of a contentious character" was not controlling.[133] This type of testimony relates to a legal determination that must be made by the finder of fact.[134] Therefore, the

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[121] *See generally* United States v. Goins, 37 C.M.R. 396 (C.M.A. 1967).

[122] UCMJ art. 39(a); *see* R.C.M. 920(c) (Requests for Instructions).

[123] 32 M.J. 596 (A.C.M.R. 1991).

[124] *See* UCMJ art. 134.

[125] *Alford*, 32 M.J. at 597.

[126] *Id.* at 598.

[127] *See generally* TJAGSA Practice Note, *Mixing Theories Under the General Article*, The Army Lawyer, May 1990, at 66.

[128] MCM, 1984, Part IV, para. 73b. *See generally* TJAGSA Practice Note, *Drunk and Disorderly Conduct*, The Army Lawyer, Mar. 1991, at 44.

[129] MCM, 1984, Part IV, para. 73c(2).

[130] *Id.*, Part IV, para. 73c(2) analysis at A21-100 (citing United States v. Manos, 24 C.M.R. 626 (A.F.B.R. 1957)); *see also* United States v. Haywood, 41 C.M.R. 939 (A.F.C.M.R. 1969); United States v. Burrow, 26 C.M.R. 761 (N.B.R. 1958); TJAGSA Practice Note, *Breach of the Peace Under Military Law*, The Army Lawyer, Sept. 1990, at 31 (discussing disorderly conduct in relation to breach of the peace).

[131] *Alford*, 32 M.J. at 598.

[132] *Id.* at 598-99. The court alluded to a prisoner handbook published by the military police captain in command of the facility. *Id.* at 599. The court explained that violations of the rules set forth in the handbook could subject the offender to administrative penalties.

[133] *Id.* at 598.

[134] *See generally* TJAGSA Practice Note, *Charging "Tuition" Can Constitute Conduct Unbecoming an Officer and a Gentleman*, The Army Lawyer, Aug. 1989, at 36, 37-38 (discussing the import of witness testimony regarding the unbecoming character of the accused's conduct in the context of a UCMJ article 133 charge).

guard properly may have testified on the factual circumstances connected with the accused's conduct that he observed, but his characterization of those circumstances, even if admissible, would not be binding. Major Milhizer.

Moving Expenses as Military Property

Whether United States currency actually is military property recently has received a great deal of attention from the service courts of review.[135] Depending upon the crime charged, the distinction can have important practical consequences. For example, larceny of military property of a value of more than $100 exposes an accused to a maximum punishment of a dishonorable discharge, total forfeitures, and ten years of confinement.[136] Larceny of nonmilitary property of the same value has a lesser maximum punishment of a dishonorable discharge, total forfeitures, and only five years of confinement.[137]

The status of money as military property was one issue faced by the Army Court of Military Review in its recent decision in *United States v. Parks*.[138] The accused in *Parks* was convicted, *inter alia*, of attempted larceny[139] of $1192 in United States currency.[140] The accused allegedly attempted to steal this money by submitting a false claim in connection with a "do-it-yourself" (DITY) shipment of household goods.[141] In its recent decision in *Thomas*,[142] the Air Force Court of Military Review considered whether United States currency was military property under somewhat similar facts.[143]

The court in *Thomas* concluded that a case-by-case test should be applied to determine whether the appropriated funds at issue constituted military property. The court then explained:

> The moving and temporary lodging allowances in issue in this case are not unique to the military. Nor are they put to any military function that entitles them to the special protective status (a doubling of the available maximum confinement) accorded "military property" under Article 121, UCMJ. Ordinarily, it is the property it purchases, not the money itself, which has the "uniquely military nature" or will be put to a "function" which merits its inclusion in the specially-protected category of "military property."[144]

Accordingly, the court concluded that the money stolen by the accused was not military property.[145]

With *Thomas*, the Air Force court seemed to retreat somewhat from its earlier en banc decision in *Ford*.[146] A majority of the Air Force court in *Ford* concluded that billeting funds collected from guests staying in billeting facilities were not military property. The majority apparently applied a bright-line test—property is "nonmilitary" if it does not derive its existence from funds appropriated by Congress and is being held by a nonappropriated fund instrumentality (NAFI) for its exclusive use.[147]

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[135] *E.g.*, United States v. Thomas, 31 M.J. 794 (A.F.C.M.R. 1990); United States v. Ford, 30 M.J. 871 (A.F.C.M.R. 1990) (en banc). *See generally* United States v. Thompson, 30 M.J. 905 (A.C.M.R. 1990) (addressed whether peanuts and coffee taken from an Army commissary storage facility were military property). For earlier discussions of the issues raised in cases such as *Thomas* and *Ford*, see TJAGSA Practice Note, *Appropriated Funds as Military Property*, The Army Lawyer, Jan. 1991, at 44, and TJAGSA Practice Note, *Defining Military Property*, The Army Lawyer, Oct. 1990, at 44.

[136] MCM, 1984, Part IV, para. 46e(1)(c).

[137] *Id.*, Part IV, para. 46e(1)(d).

[138] 32 M.J. 705 (A.C.M.R. 1991).

[139] *See* UCMJ art. 80.

[140] *Parks*, 32 M.J. at 705. Note that attempted larceny exposes the accused to the same maximum punishment as the consummated crime of larceny, and incorporates the same aggravating punishment factors as larceny, including value. MCM, 1984, Part IV, para. 4e.

[141] *Parks*, 32 M.J. at 706. Specifically, the accused made a DITY shipment of household goods to his military family quarters from his civilian residence. In connection with this shipment, the accused allegedly used false weight certificates showing that he shipped only authorized items. The government's evidence reflected instead that the shipment contained several unauthorized items, including "trash and building materials." *Id.* The attempted larceny was based upon the accused's later submission of a claim for reimbursement for these expenses.

[142] 31 M.J. 794 (A.F.C.M.R. 1990).

[143] The accused in *Thomas* made a permanent change of station move from Illinois to Alaska. *Id.* at 795. He was accompanied by his girlfriend only. The accused's claims for temporary lodging, cost of living, and variable housing allowances all indicated that he was accompanied by his wife and son. He also falsely claimed expenses for a DITY move for his wife and son that never was made. In addition, the accused made other false claims involving inflated amounts and a lost identification card for his wife. As a result of this misconduct, the accused received nearly $5700 in excess entitlements. These actions by the accused were charged, *inter alia*, as four specifications of larceny of military property, in violation of UCMJ art. 121.

[144] *Id.* at 797.

[145] In *Thompson*, 30 M.J. 905 (A.C.M.R. 1990), the Army Court of Military Review used the same case-by-case approach in deciding whether peanuts and coffee, taken from an Army commissary storage facility, were military property. Although the Army court concluded that the particular items at issue in *Thompson* were not uniquely military in nature and function—and therefore not military property—the court observed in dicta that it could "envision a situation where property destined for resale by an Army commissary could be considered 'military property.'" *Id.* at 906.

[146] 30 M.J. 871 (A.F.C.M.R. 1990) (en banc).

[147] *Id.* at 872-74. The dissent in *Ford* favored a case-by-case approach similar to the approach used in *Thomas* and *Thompson*. *Id.* at 876 (Blommers, J., dissenting). Rather than categorically concluding that all NAFI property is per se "nonmilitary," the dissent analyzed the property at issue to see if it was uniquely military in nature or function. *Id.* at 877. The dissent concluded that the billeting funds at issue in *Ford* satisfied this definition of military property because they were used to maintain and upgrade transient quarters for students and personnel on temporary duty and thereby "perform[ed] a *function* directly related to military mission accomplishment." *Id.* at 878 (emphasis in original).

The concurring opinions in *Ford* specifically addressed the status of money as constituting military property. *Id.* at 875 (Hodson, C.J., concurring in the result); *id.* at 875-76 (Pratt, J., concurring in the result). The concurring judges found that money never can be considered military property, concluding that "while money buys weapons and material which become military property, the money itself does not attain that status." *Id.*

The Army court in *Park*—as did the Air Force Court in *Thomas*—applied a fact-specific test to determine whether currency was military property. Quoting from *United States v. Schelin*,[148] the court in *Park* wrote that "[t]o qualify as military property, the item in question must have 'some unique military nature or function.'"[149] The court concluded that under the circumstances presented in *Park*, "United States currency disbursed by a finance office would not have the requisite uniqueness."[150]

Thus, the greater weight of recent authority—including *Park*, *Thompson*, and *Thomas*—favors a fact-based test for determining whether property, including money, qualifies as military property. This test focuses upon the nature and function of the property at issue, rather than considering the character of the property in the abstract. Accordingly, practitioners should martial evidence and fashion arguments that respond to this test. Major Milhizer.

Curing Variance on Appeal

Pursuant to his pleas, the accused in *United States v. Matura*[151] was convicted of wrongfully using amphetamines[152] on divers occasions between 1 January 1989 and 17 October 1989.[153] On appeal, the Air Force Court of Military Review concluded that the accused's misconduct actually occurred from May 1989 to October 1989.[154] Accordingly, the Air Force court considered whether it should modify the findings to reflect this variance.[155]

The court in *Matura* recognized the presence of "competing considerations"[156] in addressing the issue. The court first observed that "[o]n the one hand, the criminal record of a convicted individual should fairly reflect his/her wrongdoing."[157] This concern has led military appellate courts over time to amend findings so that they more accurately portray the nature and scope of the accused's misconduct.[158] These courts typically have premised their curative actions upon UCMJ article 59(a), which provides that "[a] finding or sentence of court-martial may not be held incorrect on the ground of an error of law unless the error materially prejudices the substantial rights of the accused."[159]

The court in *Matura* also recognized that on other occasions, the military's appellate courts have concluded that they would not act to "tidy up" findings—especially when the accused is protected against a second prosecution and was not misled.[160] Interestingly, advocates of this hands-off approach sometimes have relied similarly upon article 59(a).[161]

After considering these conflicting values, the Air Force Court of Military Review announced that it would apply the following rule to what it termed "minor variances, such as limited differences in dates or amounts alleged: *Unless the matter is raised at trial, we will consider it waived absent plain error.*"[162] The court offered

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[148] 15 M.J. 218, 220 (C.M.A. 1983).

[149] *Park*, 32 M.J. at 706.

[150] *Id.*

[151] 32 M.J. 671 (A.F.C.M.R. 1991).

[152] *See* UCMJ art. 112a.

[153] *Matura*, 32 M.J. at 671.

[154] *Id.* at 672.

[155] "A 'variance' in a criminal case is an essential difference between accusation and proof." Black's Law Dictionary 1723 (Rev. 4th ed. 1968).

[156] *Id.*

[157] *Id.* (citing United States v. White, 28 M.J. 530 (A.F.C.M.R. 1989); United States v. Cimoli, 10 M.J. 516, 519 n.7 (A.F.C.M.R. 1980); United States v. Tyler, 14 M.J. 811, 813 (A.C.M.R. 1982); *see also* United States v. Hyska, 29 M.J. 122, 125 (C.M.A. 1989); United States v. Maglito, 43 C.M.R. 296, 300 (C.M.A. 1971)).

[158] *Matura*, 32 M.J. at 672 (citing *Maglito*, 43 C.M.R. at 300; United States v. Daye, 17 M.J. 555, 557 (A.C.M.R. 1983); United States v. Alexander, CM 28184 (A.F.C.M.R. 9 Mar. 1990) (unpub.); United States v. Watson, CM 28172 (A.F.C.M.R. 8 Feb. 1990) (unpub.); *see also* United States v. Ritenour, 41 C.M.R. 414, 416 (A.C.M.R. 1969)).

[159] *See, e.g.*, United States v. Bolling, 16 M.J. 901, 902 (A.C.M.R. 1983); *Tyler*, 14 M.J. at 813 (court takes corrective appellate action to ensure that the accused's criminal record accurately reflects the nature and scope of his misconduct, in the context of multiplicity for findings). Arguably, UCMJ article 66(c) also supports the activist approach because it provides, in part, that a court of review "may affirm only such findings of guilty and the sentence or such part or amount of the sentence, as it finds correct in law and fact."

[160] *Matura*, 32 M.J. at 672 (citing United States v. Lee, 1 M.J. 15 (C.M.A. 1975); United States v. Jackson, 23 M.J. 650, 654 (N.M.C.M.R. 1986); United States v. Bowers, 20 M.J. 1003 (A.F.C.M.R. 1985); *Daye*, 17 M.J. at 557). This is generally consistent with the conventional approach of military appellate courts to test for prejudice in cases of variance. *See, e.g.*, United States v. Leslie, 9 M.J. 646 (N.C.M.R. 1980); United States v. Rath, 27 M.J. 600 (A.C.M.R. 1988) (variance with respect to different dates); United States v. Esslinger, 26 M.J. 659 (N.M.C.M.R. 1988) (different times or places).

[161] *See, e.g.*, *Bolling*, 16 M.J. at 903 (Foreman, J., concurring in the result); United States v. McMaster, 15 M.J. 525, 527 (A.C.M.R. 1982) (Foreman, J., dissenting) (in the context of dismissing a multiplicious charge on appeal when the sentence was not prejudiced).

[162] *Matura*, 32 M.J. at 672. The court made this rule prospective only. Accordingly, the accused's findings were amended to reflect the actual time period of his misconduct. *Id.*

two reasons in support of this approach. First, the court reasoned that "defense advocates know far better than we whether a valid objection exists."[163] Second, the court believed that military judges generally ensure that the findings conform to the evidence.

The court's rationale is in keeping with the general trend in military justice of relying more upon the competent representation of defense counsel, and less upon the paternalistic protection of the trial and appellate judiciary.[164] The court's approach also recognizes that defense counsel may have sound tactical reasons for deciding not to object to variance. These reasons could include insulating the accused from uncharged misconduct and avoiding a subsequent prosecution for other crimes that would not be embraced within an accurately drafted specification.

With this enhanced reliance upon defense counsel naturally comes greater responsibility. As a rule, the accused is benefited by having his conviction limited strictly to the scope of his or her actual misconduct. This rule applies equally with respect to both variance and multiplicity for findings. If and when the appellate courts deemphasize their role in providing corrective oversight of these matters, defense counsel's responsibility for providing this protection to his or her client necessarily becomes even more critical.

To date, neither the Court of Military Appeals, nor any other service court of review, formally has followed the lead of the Air Force court. As many of the cases cited above suggest, however, these courts have seemed to drift—at least informally—toward the hands-off approach announced in *Matura*. Major Milhizer.

Does a Police Officer's Chase of a Person Trigger the Fourth Amendment?

In *California v. Hodari D.*[165] the United States Supreme Court held that when a police officer chases a person, the subject of the pursuit does not accrue the protections of the fourth amendment automatically if the chase of the fleeing suspect involves no physical force. A police officer needs neither "probable cause" nor "reasonable suspicion"[166] to chase a person who flees after seeing him, and the seizure of any contraband thrown away by the suspect during the chase does not trigger any fourth amendment protections because these objects do not constitute "fruit of a seizure."[167] Instead, the suspect who fails to obey an order to stop is not seized within the meaning of the fourth amendment until he or she is caught or acquiesces to the police's show of authority.

In *Hodari D.* the accused and three or four youths were "huddled around a small red car parked"[168] in a high-crime area of Oakland, California. When the juveniles saw an unmarked police car approach, they fled on foot. The police were suspicious, and chased the youths. Hodari D. was about to be caught when he threw away what looked like "a small rock."[169] An instant later, Hodari D. physically was seized by the police and handcuffed. A search incident to apprehension revealed $130 in cash and a telephone pager. Moreover, the "rock" he had tossed away was determined to be crack cocaine. At trial, Hodari D. moved to suppress the evidence relating to the cocaine on the grounds that he had been "seized" when he saw the policeman chasing him. Specifically, he asserted that because the police lacked probable cause—much less reasonable suspicion to briefly detain him—the seizure was unreasonable under the fourth amendment and the crack cocaine he had thrown away during the chase should be suppressed as the fruit of this illegal seizure.

The trial court denied Hodari D.'s motion without opinion. The California Court of Appeals reversed, however, agreeing with Hodari D. that an illegal seizure had occurred when he had seen the police running toward him. The California Supreme Court subsequently denied the State of California's application for review, but the United States Supreme Court granted certiorari. Because the fourth amendment forbids unreasonable seizures of a person, the question presented was whether Hodari D. was "seized" when the police pursued him—that is, did the police "show of authority" in requesting Hodari D. to stop, as well as their chasing him when he did not stop amount to a seizure?

Justice Scalia, writing for the Court seven-justice majority, reasoned that Hodari D.'s failure to halt and the absence of the police's "laying on of hands or application of physical force to restrain movement"[170] meant

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[163] *Id.*

[164] *See, e.g.*, Mil. R. Evid. 103 (waiver of evidentiary objections absent plain error).

[165] 111 S. Ct. 1547 (1991).

[166] *See* Terry v. Ohio, 392 U.S. 1 (1968) (articulable, reasonable suspicion that criminal activity is present allows brief, warrantless investigative detention and a limited search or "stop and frisk").

[167] *Hodari D.*, 111 S. Ct. at 1548.

[168] *Id.*

[169] *Id.*

[170] *Id.* at 1549.

that no seizure occurred. In Justice Scalia's words, a seizure does not occur when a policeman yells, "'Stop in the name of the law!' at a fleeing form that continues to flee."[171] Unless physical force becomes necessary or, "where that is absent, *submission* to the assertion of authority,"[172] a seizure does not occur under the fourth amendment. Therefore, when the police order a person to submit to their authority, and he or she ignores that "show of authority" by fleeing, a seizure does not occur until that person physically is caught or submits to that authority. Accordingly, any contraband or other evidence discarded by a person who flees—rather than submitting to police authority—is admissible at trial on the grounds that the person abandoned any privacy interest he or she had in the item.

Hodari D. decides a very narrow issue, but one that is important to counsel because suspects often abandon evidence—weapons, drugs, and other items—while fleeing from the military police in a motor vehicle or on foot. As the law now stands, neither probable cause nor reasonable suspicion are needed to give chase when a person flees, rather than submitting to a police order to stop. On the other hand, does an illegal apprehension occur if, while the police still have neither probable cause to believe a crime has been committed nor reasonable suspicion that criminal activity is afoot, the suspect later is caught or surrenders? Or would the flight itself then give the needed reasonable suspicion? Because the courts have resisted adopting the idea that flight from the police reflects wrongdoing, the traditional legal response has been that it does not.[173] Justice Scalia, however, suggested in a footnote that the Court may be ready to discard this belief: "That it would be unreasonable to stop, for brief inquiry, young men who scatter in panic upon the mere sighting of the police is not self-evident, and arguably contradicts proverbial common sense. *See* Proverbs 28:1 ("The wicked flee when no man pursueth")."[174] Because California chose to concede on appeal that the police lacked the reasonable suspicion needed to stop Hodari D., the Court did not decide whether *flight* at the sight of the police may provide the reasonable suspicion needed for a brief "stop and frisk." For the Court to suggest, however, that associating flight with criminal misconduct is logical, indicates that the law controlling police "stop and frisk" encounters soon may be changing. Major Borch.

Legal Assistance Items

The following notes have been prepared to advise legal assistance attorneys of current developments in the law and in legal assistance program policies. They also can be adapted for use as locally published preventive law articles to alert soldiers and their families about legal problems and changes in the law. We welcome articles and notes for inclusion in this portion of *The Army Lawyer*. Submissions should be sent to The Judge Advocate General's School, ATTN: JAGS-ADA-LA, Charlottesville, VA 22903-1781.

Army Chief of Staff Legal Assistance Awards

The 1991 Army Chief of Staff Legal Assistance Award for Excellence has been awarded to thirty-seven installations worldwide. The awardees were chosen from a field of forty-eight nominations.

Each year has brought an increase of nominations and awards over the previous year. Last year, twenty-nine of forty-seven nominations received awards and in 1989, twenty-seven of thirty-eight installations won.

The award selections are based upon the standards set forth in Department of the Army Pamphlet 600-45, Army Communities of Excellence—Guidelines for Community Excellence.

The following installations received the 1991 award:

25th Infantry Division (Light), Schofield Barracks
3d Infantry Division, FRG
Fort Jackson
Kitzingen Branch Office, 3d ID, FRG
21st TAACOM (Kaiserslauten), FRG
1st Infantry Division (Fwd), FRG
Vint Hill Farms Station
Fort Gordon
Fort McClellan
8th Infantry Division, FRG
Fort Sheridan
21st TAACOM (Mannheim), FRG
Fort Clayton, Panama
Aberdeen Proving Ground
Fort Detrick
VII Corps, FRG
III Corps and Fort Hood
Fort Sam Houston
I Corps and Fort Lewis
Fort Leonard Wood
XVIII Airborne Corps

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[171] *Id.*

[172] *Id.*

[173] *See* People v. Aldridge, 674 P.2d 240 (Cal. 1984) (no reasonable suspicion arose when only factors were that incident occurred late at night in a high crime area, and defendant and his friends fled at sight of police car); *People v. Shabaz*, 378 N.W. 2d 451 (Mich. 1985) (no reasonable suspicion based on late hour, high crime area, defendant's leaving building where drug sales were known to occur, and his taking off running when he saw police). The defendant's "exercising freedom of liberty under the Fourth Amendment ... even at top speed ... does not tip the balance in favor of reasonable suspicion." *Id.*

[174] *Hodari D.*, 111 S. Ct. at 1547 n.1.

Fort Huachuca
V Corps, FRG
Fort Knox
2d Armored Division
Wildflecken Branch Office, V Corps, FRG
Berlin, FRG
5th Infantry Division and Fort Polk
Fulda Branch Office, V Corps, FRG
Fort Sill
Carlisle Barracks
Fort Monmouth
North Stuttgart Branch Office, VII Corps, FRG
Fort Benning
Camp Humphreys, Korea
32d AADCOM, FRG
Wiesbaden Branch Office, V Corps, FRG

The commands with the best Legal Assistance Offices were the 25th Infantry Division (Light) located at Schofield Barracks, Hawaii, and the 3d Infantry Division stationed in Germany. Lieutenant Colonel Hansen.

Family Law Note

Alabama Allows Voluntary Division of Military Retired Pay as Property

In 1981, the United States Supreme Court held in *McCarty v. McCarty*[175] that military retired pay could not be divided as marital property in a divorce proceeding, absent a federal statute allowing that type of division. Congress responded to *McCarty* in 1983, by enacting the Uniformed Services Former Spouses' Protection Act (USFSPA).[176] The USFSPA permits state courts to divide "disposable military retired pay"[177] as marital property if authorized by state law.

Since the passage of the USFSPA, all states except Alabama have held in case law or have provided by statute that military pensions are divisible as property. While Alabama continues to not allow courts to order involuntary division of military pensions as marital property, it has allowed military pensions to be considered when determining whether or not to award alimony.[178]

Even in Alabama, however, a retiree inadvertently can subject his retirement pay to division as property. Recently, the Alabama Court of Civil Appeals held in *Williams v. Williams* that voluntary divisions of military pensions can be the basis of a property settlement in Alabama.[179] In *Williams* the parties had executed a property settlement that assigned the wife fifty percent of the husband's military retirement benefits. The property settlement subsequently was incorporated[180] into the divorce decree.

The court rejected the husband's arguments that either the property settlement was voidable or that the divorce decree was void for being contrary to state law. Instead, the court stated, "we can find no case law or authority in this state prohibiting a voluntary agreement, as opposed to a court award, that subjects military retirement benefits to a division as marital property between divorcing parties."

Whether to pay a portion of retired pay as alimony or have it divided as property is not an academic exercise. From the retiree's perspective, paying a portion of military retired pay as alimony is always better then paying it as a part of a property settlement. First, it ensures that the ex-spouse pays any taxes owed on the money received.[181] More importantly, however, it preserves the right of a retiree to receive all of his or her retired pay upon the remarriage of his ex-spouse. As a result, legal assistance attorneys should take extra precautions to ensure that soldiers who are domiciliaries of Alabama do not unnecessarily expose their retirement pay to division as marital property through execution of poorly drawn separation agreements or property settlements. Major Connor.

Estate Planning Notes

Living Wills Update

Living wills continue to be one of the faster developing areas of law in this country. This note discusses several recent developments in the courts and in state statutes, and updates a previous note on this issue.[182]

Perhaps the most important development during the last year was the United States Supreme Court's decision

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[175] 453 U.S. 210 (1981).

[176] 10 U.S.C. § 1408 (1988).

[177] *Id.* § 1408(a)(4).

[178] *See, e.g.*, Phillips v. Phillips, 489 So. 2d 592 (Ala. Civ. App. 1986) (wife awarded 50% of husband's gross military pay as alimony).

[179] Williams v. Williams, 17 Fam. L. Rep. (BNA) 1290 (Ala. Ct. Civ. App. Apr. 5, 1991).

[180] When a court "incorporates" a separation agreement or property settlement into the divorce decree, the court recognizes that the agreement or settlement is valid and includes its terms as part of the decree. This usually insulates the terms of the agreement or settlement from collateral attack, at least to the extent the terms of the agreement or settlement are not covered otherwise by the decree.

[181] A recent amendment to the USFSPA has blurred the tax consequences of paying a portion of a military retired pay as alimony or as property. Section 555 of the National Defense Authorization Act for Fiscal Year 1991 provides that amounts paid directly to a former spouse by a military finance center will not be treated as retired pay earned by the retiree. National Defense Authorization Act for Fiscal Year 1991, Pub. L. No. 101-510, § 555, 104 Stat. 4739 (1990) (amending 10 U.S.C. § 1408 (1988)). Presumably, this change means that former spouses now will be responsible for paying any income taxes owed on the portion of retired pay they receive.

[182] TJAGSA Practice Note, An Update on Living Wills, *The Army Lawyer*, Dec. 1989 at 42.

in *Cruzan v. Director, Missouri Department of Health.*[183] In *Cruzan* a five-justice majority of the Supreme Court upheld a Missouri Supreme Court decision holding that a judge could terminate tube feeding only if the fact that the patient would make the same choice could be proved by "clear and convincing" evidence. The Supreme Court found that the United States Constitution does not prevent the state from adopting a policy that ignores the desires of parents and allows a judge to decide the fate of a patient. Although the Court found that every competent patient has a right under the due process clause to make his or her own treatment decisions, that right is subject to state regulation to promote legitimate state interests.[184]

Both the Missouri Supreme Court and United States Supreme Court strongly implied that if Nancy Cruzan had left clear and explicit directions regarding her medical treatment wishes, the courts would have followed them. *Cruzan* therefore has prompted many Americans to consider documenting their health care treatment desires before incompetency.

Since 1976, when the New Jersey Supreme Court decided the celebrated Karen Quinlan case[185] state legislatures in forty-four states and the District of Columbia have passed legislation allowing a patient to prepare health care treatment documents to control medical treatment during periods of incompetency.[186] As of 1991, only Michigan, New Jersey, Nebraska, Ohio, Pennsylvania, and South Dakota had not enacted legislation authorizing either living wills or durable powers of attorney for health care.

Living will statutes provide a method for a patient to record his or her treatment desires to guide health care providers when he or she is incompetent. Living wills laws typically provide immunity to health care providers who follow a patient's expressed desires. Most of the living wills laws that have been enacted, however, suffer from a number of shortcomings. These statutes generally authorize the use of living wills only when death from a terminal illness is imminent. The statutes also limit the types of treatment that can be withheld. Moreover, these laws do not provide a penalty if health care professionals refuse to follow them. A recent study revealed that health care providers contradicted instructions in a living will in twenty-five percent of the cases examined.[187]

The shortcomings in living wills statutes have prompted legislatures in twenty states to enact legislation

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[183] 110 S. Ct. 2841 (1990).

[184] *Id.*

[185] 348 A.2d 647 (1976).

[186] Alabama Natural Death Act, Ala. Code §§ 22-8A-1 to 10 (1990); Alaska Rights of the Terminally Ill Act, Alaska Stat. §§ 18.12.010 to .100 (1986); Arizona Medical Treatment Decision Act, Ariz. Rev. Stat. Ann. §§ 36-3201 to 3210 (1986); Arkansas Rights of the Terminally Ill or Permanently Unconscious Act, 1987 Ark. Code Ann. §§ 20-17-201 to 218 (Michie Supp. 1989); California Natural Death Act, Cal. Health & Safety Code §§ 7185-7195 (West Supp. 1991); Colorado Medical Treatment Decision Act, Colo. Rev. Stat. §§ 15-18-101 to 113 (1987 & Brad Supp. 1990); Connecticut Removal of Life Support Systems Act, Conn. Gen. Stat. §§ 19a-570 to 575 (West Supp. 1990); Delaware Death with Dignity Act, Del. Code Ann. tit. 16, §§ 2501-2509 (1987); District of Columbia Uniform Determination of Death Act of 1981, D.C. Code Ann. §§ 6-2421 to 2430 (1989); Florida Life-Prolonging Procedure Act, Fla. Stat. Ann. §§ 765.01 to .17 (1990); Georgia Living Will Act, Ga. Code Ann. §§ 31-32-1 to 2 (1985 & Michie Supp. 1990); Hawaii Medical Treatment Decisions Act, Haw. Rev. Stat. §§ 327D-1 to 27 (Supp. 1990); Idaho Natural Death Act, Idaho Code §§ 39-4502 to 4509 (Michie Supp. 1990); Illinois Living Will Act, Ill. Ann. Stat. ch. 110½, §§ 701-710 (West Supp. 1990); Indiana Living Wills and Life-Prolonging Procedures Act, Ind. Code Ann. §§ 16-8-11-1 to 22 (1990); Iowa Life Sustaining Procedures Act, Iowa Code Ann. §§ 144A.1 to .11 (1989); Kansas Natural Death Act, Kan. Stat. Ann. §§ 65-28, 101 to 28,109 (1985); Kentucky Living Will Act, Ky. Rev. Stat. §§ 311.622 to .644 (Michie Supp. 1990); Louisiana Life-Sustaining Procedures Act, La. Stat. Ann. §§ 40:1299.58.1 to .10 (West Supp. 1991); Maine Rights of Terminally Ill Act, Me. Rev. Stat. Ann. tit. 22, §§ 5-701-714 J (West Supp. 1990); Maryland Life-Sustaining Procedures Act, Md. Health-Gen. Code Ann. §§ 5-601 to 614 (Michie Supp. 1990); Massachusetts: No living will statute, *but see* Health Care Proxy Act; Michigan: No living will statute; Minnesota Adult Health Care Decisions Act, Minn. Stat. Ann. §§ 145B.01-.17 (West Supp. 1991); Mississippi Withdrawal of Life-Saving Mechanisms Act, Miss. Code Ann. §§ 41-41-101 to 121 (L. Coop. Supp. 1990); Missouri Life Support Declarations Act, Mo. Stat. Ann. §§ 459.010 to .055 (West Supp. 1991); Montana Living Will Act, Mont. Code Ann. §§ 50-9-101 to 104, 111, 202 to 206 (1989); Nebraska: No living will statute; Nevada Withholding or Withdrawal of Life-Sustaining Procedures Act, Nev. Rev. Stat. §§ 449.540 to .690 (1986, Supp. 1989); New Hampshire Terminal Care Document Act, N.H. Rev. Stat. Ann. §§ 137-H:1 to 16 (1990); New Jersey: No living will statute; New Mexico Right to Die Act, N.M. Stat. Ann. §§ 24-7-1 to 11 (1986); New York: No living will statute, *but see* Health Care Agents and Proxies Act, N.Y. Cons. Laws Ann. §§ 2980-2991 (Supp. 1991); North Carolina Right To Natural Death Act, N.C. Gen. Stat. §§ 90-320 to 323 (1990); North Dakota, Rights of Terminally Ill Act, N.D. Code §§ 23-06.4-01 to -14 Michie Supp. 1989); Ohio: No living will statute; Oklahoma Natural Death Act, Okla. Stat. Ann. tit. 63, §§ 3101-3111 (West Supp. 1991); Oregon Directive to Physicians Act, Or. Rev. Stat. §§ 127.605 to 650 (1989); Pennsylvania: No living will statute; Rhode Island: No living will statute, but provides for health care power of attorney; South Carolina Death with Dignity Act, S.C. Code Ann. §§ 44-77-10 to 160 (L. Coop. Supp. 1990); South Dakota: No living will statute; Tennessee Right To Natural Death Act, Tenn. Code Ann. §§ 32-11-101 to 110 (Supp. 1990); Texas: No living will statute, *but see* durable power of attorney for health care § 490h-1 (Vernon Supp. 1990); Utah Personal Choice and Living Will Act, Utah Code Ann. §§ 75-2-1101 to 1118 (Supp. 1990); Vermont Terminal Care Document Act, Vt. Stat. Ann. tit. 18, §§ 1801 (Supp. 1990); Virginia Natural Death Act, Va. Code §§ 54.1-2981 to 2992 (1988 and Supp. 1990); Washington Natural Death Act, Wash. Rev. Code Ann. §§ 70.122.010 to .905 (Supp. 1991); West Virginia Natural Death Act, W. Va. Code §§ 16-30-1 to 10 (1991); Wisconsin Natural Death Act, Wisc. Stat. Ann. §§ 154.01 to .15; Wyoming Living Will Act, Wyo. Stat. §§ 35-22-101 to 109 (1988).

[187] The Washington Post, Mar. 28, 1991, at A8.

authorizing competent adults to designate another person to make decisions if they become incapacitated.[188] A durable power of attorney provides an agent with the authority to make medical decisions in a much broader range of situations than a living will. Moreover, the fact that a person is named to advance the principal's desires increases the likelihood that health care providers will follow the those desires. The durable power of attorney also serves the same function as a living will by providing evidence of a patient's health care treatment desires. The named agent has the same authority to make decisions as the principal would have had while competent, including authorizing the withdrawal or withholding of life support. Principals, however, have the right to limit the authority of the agent.

A recent trend in the United States is to allow appointment of health care proxies under state living wills statutes. In 1991, New York and Massachusetts joined twelve other states that enable competent adults to chose a proxy to make treatment decisions upon incompetency.[189] Typically, these statutes allow the named proxies to make decisions only when the patient is in the medical condition covered by the statute. Therefore, health care proxies are much more limited than durable powers of attorney.

Unfortunately, state statutes regarding advance health care directives lack both procedural and substantive uniformity.[190] The area of substantive law possessing the most diversity and controversy deals with the withdrawal of artificial hydration or tube feeding. The statutes in nine states specifically prohibit or limit the withdrawal of tube feeding, while ten other states require a determination of whether tube feeding is necessary for "comfort care." At least fourteen states specifically authorize the removal of life support, but their statutes do not address the withdrawal of artificial hydration or tube feeding.

Many lawyers and laymen misinterpreted the *Cruzan* case as prohibiting the withdrawal of tube feeding from a persistently vegetative patient. The Supreme Court, however, ruled only that the Constitution permits a state to require clear and convincing evidence of a patient's desire to have artificial hydration and nutrition withheld.

The lack of procedural and substantive uniformity in state law poses a special challenge to legal assistance attorneys who deal with a transient client base. Executing a living will or durable power of attorney in a state that does not authorize them specifically is not necessarily void; rather, it can serve as valuable evidence of a client's wishes. Moreover, Army medical facilities will consider any writing executed by a competent patient without regard to underlying state law restrictions.[191]

Unlike wills, which must be probated in the state of a soldier's domicile, the validity of a living will or durable power of attorney will depend on the law of the jurisdiction in which a soldier is being treated. Accordingly, legal assistance attorneys should prepare living wills or durable powers of attorney that conform to the state law in which the soldier currently resides. The current version of the Legal Automation Army-Wide System (LAAWS) contains a living wills program that includes forms for all states having legislation. Moreover, the TJAGSA Legal Assistance Branch has prepared a Living Wills Guide that includes a summary of each state law and the forms for each state having living wills legislation.

Client interest and legislative activity in the living wills area likely will not diminish in the near future. Even the United States Congress has become involved in this area by passing legislation requiring all hospitals, nursing facilities, and health care organizations serving Medicare or Medicaid patients to provide new adult patients with written information describing their rights under state law to make decisions about medical care.[192] This legislation takes effect on December 1, 1991, and will increase further the demand for living wills and durable powers of attorney. Major Ingold.

Using Joint Tenancies in Estate Planning

The use of joint tenancies as a form of ownership—especially between spouses—is widespread. While own-

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[188] Although all 50 states have adopted laws authorizing durable powers of attorney, only the following 20 states specifically allow using durable powers of attorney to withhold or withdraw life support: California, Florida, Georgia, Illinois, Kansas, Kentucky, Maine, Mississippi, Nevada, New York, Ohio, Oregon, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Vermont, West Virginia, and the District of Columbia.

[189] The other twelve states are Arkansas, Delaware, Florida, Idaho, Indiana, Louisiana, Maine, Massachusetts, Minnesota, New York, Texas, Utah, Virginia, and Wyoming.

[190] The disparity in the area of living wills legislation is discussed in Warnock, *Living Wills: The Need For Uniform State Laws*, Prob. & Prop. J., May/June 1991, at 52.

[191] Army Reg. 40-3, Medical Services: Medical, Dental, and Veterinary Care, chap. 19 (15 Feb. 1985). The Army policy regarding withdrawal of life sustaining treatment is discussed in Woodruff, *Letting Life Run Its Course: Do-Not-Resuscitate Orders and Withdrawal of Life-Sustaining Treatment*, The Army Lawyer, Apr. 1989, at 6.

[192] 42 U.S.C. § 1395(a)(1) (1988) (as amended Nov. 1990).

ing property in joint tenancy with right of survivorship will avoid probate, this form of ownership has several tax implications and drawbacks that must be considered carefully.

The most obvious disadvantage to joint tenancy is that the person creating the joint tenancy relinquishes control over ultimate disposition of the property. The surviving joint owner possesses complete testamentary freedom to dispose of the property, notwithstanding the wishes of the former joint owner. Far too many individuals have titled property in joint tenancy or opened up joint accounts for convenience without recognizing this characteristic of joint tenancy with right of survivorship. This feature of joint ownership also may pose problems for married couples. For example, titling property in joint tenancy would be an extremely poor choice for a client married to a spouse with children from a former marriage when the client does not want those children to share in any portion of his or her estate.

A potential estate tax problem also arises if most of a couple's property is held in joint tenancy. Because of the unlimited marital deduction, no federal estate tax will be due upon the death of the first spouse.[193] That spouse, however, will not use any portion of his or her $600,000 exemption and the full value of all property formerly held in joint tenancy will be included in the surviving spouse's gross estate. Couples with total assets over $600,000 should consider alternatives to joint tenancy that will allow the spouse who dies first to use some or all of the federal exemption to minimize the estate tax burden.

Another potential tax drawback to joint tenancies between couples must be considered. Under current law, one-half of the value of joint property held between husband and wife will be included in the gross estate of the first spouse to die.[194] The surviving spouse will not get a step-up in basis for the portion of the jointly owned property that is not included in the decedent's gross estate. For example, assume that a husband purchased land for $20,000 and retitled the property in joint ownership with his wife. Twenty years later, the husband dies when the fair market value of the land is $100,000. The wife's basis in the property would be $50,000 and, if she sold the property for its fair market value, she would realize a gain of $50,000.[195] If the property were owned only by husband and passed to the wife by will, the property would receive a complete step-up in basis and no gain would be realized on the sale of the property for its fair market value.

Persons also should examine the gift tax ramifications of retitling property in joint ownership. Since 1981, the creation of a joint tenancy between husband and wife does not have any gift tax consequences.[196] As it does between other parties, however, the creation of a joint tenancy gives rise to a taxable gift on one-half of the value of the property.[197] Some exceptions to this gift tax treatment exist. For example, the creation of a joint bank account generally is considered a revocable transfer to which no gift tax applies unless and until a joint owner withdraws money exceeding the amount he or she deposited.[198] Another exception applies when a parent purchases a United States Savings Bond under joint ownership form with a child. No gift is considered made by the parent unless the child redeems the bond or the bond is reissued in the name of the child alone.[199]

Joint tenancies may be considered as a device to address special testamentary problems. For example, an individual may wish to pass property to an unrelated person without the publicity associated with transfers by will. Joint tenancies also have been used with some success as a device to limit the reach of creditors. Joint tenancies, however, rarely will be successful in defeating a spouse's dower or elective share rights. Most states follow the approach of examining the augmented estate of a decedent, including property held in joint ownership with third parties, in determining the size of a widow's elective share.[200] Courts also will prevent spouses from circumventing a contract not to revoke a will by placing assets in joint tenancy.[201]

While some situations may suggest a joint tenancy, all of the implications associated with this form of ownership should be considered carefully. The estate and gift tax implications and the loss of ultimate testamentary control may outweigh the convenience and probate-avoidance advantages stemming from owning property in joint tenancy. Major Ingold.

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[193] I.R.C. § 2056 (West Supp. 1990).

[194] *Id.* § 1014(b)(9).

[195] An argument could be made that the wife's basis is $60,000 by claiming that the husband made a deemed gift to her of one-half of its acquisition cost of $20,000.

[196] I.R.C. § 2523(a) (West Supp. 1990).

[197] The donor, however, may use his or her $10,000-per-donee annual gift tax exclusion to limit or avoid the gift tax.

[198] Treas. Reg. § 25.2511-1(h) ex. 4; Rev. Rul. 69-148, 1969-1 C.B. 226.

[199] Rev. Rul. 55-278, 1955-1 C.B. 471.

[200] Harris v. Rock, 799 S.W.2d 10 (Ky. 1990); *see also* Uniform Probate Code § 2-202 (1990).

[201] Robison v. Graham, 799 P.2d 610 (Okla. 1990).

Consumer Law Note

Mental Anguish in a Non-Lemon-Law State

A previous legal assistance consumer law note listed forty-six states and the District of Columbia as having new car lemon laws protecting consumers who purchase cars with substantial mechanical defects.[202] Attorneys should be aware of the remedies available under these comprehensive laws as well as new developments in non-lemon-law states. Recently, the Alabama Supreme Court interpreted the Alabama Uniform Commercial Code (UCC)[203] as allowing compensation for a new car owner's mental suffering incurred during several frustrating months of repeated repair work and dangerous breakdowns.[204] The Alabama UCC allowed damages for "injury to the person" caused by breach of warranty, and the court found that this included not only damages for physical injury, but also damages for mental anguish. The owner suffered "anxiety, embarrassment, anger, fear ... disappointment, and worry ....," entitling him to $8000 in compensatory damages.

Small claims courts also may hear arguments on compensation for mental anguish. This judicial avenue often is used by legal assistance clients in settling disputes and should not be overlooked in an appropriate case. Major Hostetter.

Veterans' Law Note

VRRL Protects Job Applicant Denied Employment Because of Reserve Duty

The Veterans Reemployment Rights Law (VRRL) was amended in 1986 to protect reservists from discrimination in hiring decisions because of Reserve obligations.[205] In a case of first impression, *Beattie v. Trump Shuttle, Inc.*,[206] an Air Force Reserve officer successfully relied on this provision to sue an employer for refusing to hire him because of his attendance at a military school.

While the Air Force officer, Beattie, was working as a pilot for Eastern Airlines, he received permission to attend the Industrial College of the Armed Forces (ICAF) for nine months. Several months into his leave of absence, Trump Shuttle entered into an agreement to purchase Eastern Airline's assets and operations. Trump Shuttle offered to rehire Eastern's pilots conditioned on their availability to attend training two weeks before Trump Shuttle was scheduled to take over operations. Beattie, however, could not meet this condition because of his attendance at the ICAF. Accordingly, Trump Shuttle did not extend Beattie an offer of employment even though he was fully qualified for a position and submitted a timely application.

Beattie argued that Trump Shuttle's refusal to hire him violated the antidiscrimination provision of the VRRL.[207] Trump Shuttle raised three arguments to counter this contention.

First, Trump Shuttle argued that the VRRL protects only the right to reinstatement. The court noted, however, that the language of the VRRL and its legislative history clearly establish that the section was amended specifically to protect reservists from discrimination when initially applying for employment.

Trump Shuttle also maintained that it did not hire Beattie because he was unavailable—not because of his Reserve duty. The court ruled, however, that the VRRL does not condition protection on the reservist's eligibility at the time specified by an employer. In light of the Supreme Court's admonition to construe the VRRL liberally,[208] the court refused to limit the protection of the law only to individuals who are available to begin work immediately.

Trump Shuttle's final contention was that Beattie's attendance at ICAF was not a Reserve "obligation" within the meaning of the VRRL. The court, however, found that Beattie was under an obligation to complete his training at ICAF and that he could not withdraw unilaterally to take employment. The court determined that this obligation triggered the antidiscrimination protections of the VRRL and held Trump Shuttle liable to Beattie under the law. Major Ingold.

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[202] TJAGSA Practice Note, *Updated Listing of New Car Lemon Laws*, The Army Lawyer, April 1991, at 45.

[203] Ala. Code § 7-2-714 (1975).

[204] Volkswagon of Am., Inc. v. Dillard, No. 89-1736 (Ala. Mar. 8, 1991).

[205] 38 U.S.C. § 2021(b)(3) (1988).

[206] 758 F. Supp. 30 (D.D.C. 1991).

[207] 38 U.S.C. § 2021(b)(b)(3) (1988). This section provides:

> Any person who seeks or holds a position described in clause (A) or (B) of subsection (a) of this section shall not be denied hiring, retention in employment, or any promotion or other incident of employment because of any obligation as a member of a Reserve component of the Armed Forces.

[208] *See* Coffy v. Republic Steel Corp., 447 U.S. 191 (1980); Fishgold v. Sullivan Drydock & Repair Corp., 328 U.S. 275 (1946).

Claims Report

United States Army Claims Service

Soldiers' Tort Claims and the Soldiers' and Sailors' Civil Relief Act

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The deployment of forces in the Persian Gulf for Operations Desert Shield and Desert Storm, with the concomitant activation of thousands of reservists, has brought increased attention to various provisions of the Soldiers' and Sailors' Civil Relief Act[1] (SSCRA). One section of the SSCRA that claims judge advocates should keep in mind is the tolling provision in section 525, which reads:

> The period of military service shall not be included in computing any period now or hereafter to be limited by any law, regulation, or order for the bringing of any action or proceeding in any court, board, bureau, commission, department, or other agency of government by or against any person in military service or by or against his heirs, executors, administrators, or assigns, whether such cause of action or the right or privilege to institute such action or proceeding shall have accrued prior to or during the period of such service, nor shall any part of such period which occurs after October 6, 1942 be included in computing any period now or hereafter provided by any law for the redemption of real property sold or forfeited to enforce any obligation, tax, or assessment.[2]

The recent increased interest in, and amendment of, the SSCRA presents an opportunity to explore the impact of the tolling section on claims of active duty soldiers[3] under the Federal Tort Claims Act[4] (FTCA) and the Military Claims Act[5] (MCA).

Questioning the necessity for this inquiry is reasonable because most of the tort claims of active duty soldiers apparently are not cognizable under the FTCA due to the *Feres* doctrine enunciated by the United States Supreme Court,[6] or under the MCA due to the corresponding "incident to service" exception contained in the statute itself.[7] A closer look, however, reveals a number of situations in which these claims are not barred. These usually involve so-called "derivative claims" in which the soldier is not claiming compensation for his direct injuries—that is, when the soldier is the victim of the negligence or malpractice. Instead, the soldier is claiming compensation for the indirect injuries that he or she experienced as a result of negligent injury to a spouse or other family member, such as the loss of a spouse's consortium or medical expenses incurred as a result of an injury to a child. Actually, because of the tolling provisions of the SSCRA, an active duty soldier's claim may be the only claim of several arising from the same tortious injury that is viable under the FTCA or MCA.

Application of SSCRA Tolling to FTCA Limitations

The statute of limitations applicable to claims against the United States under the FTCA is contained in 28 U.S.C. section 2401(b), which provides:

> A tort claim against the United States *shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues.*[8]

Judicial decisions often have stated that the requirements of this section are jurisdictional and not subject to waiver.[9] Nevertheless, the courts that have addressed the issue have concluded that the tolling provision in section 525 of the SSCRA applies to soldiers' claims against the United States under the FTCA. In *Lester v. United States*[10] a husband and wife brought an FTCA action for damages resulting from injuries received by the wife in a fall down a flight of steps in front of an apartment under

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[1] 50 U.S.C. App. §§ 501-548, 560-591 (1988).

[2] *Id.* § 525 (1988), as amended by Pub. L. No. 102-12 (1991).

[3] The term "soldier" is used because this article is written from an Army perspective. Claims officers and investigators should apply the same principles in claims involving sailors, marines, and airmen.

[4] 28 U.S.C. §§ 1346(b), 2401(b), 2671-2680 (1988).

[5] 70A Stat. 153 (1956) (codified as amended at 10 U.S.C. § 2733 (1988)).

[6] Feres v. United States, 340 U.S. 135 (1950).

[7] 10 U.S.C. § 2733(b)(3) (1988).

[8] 28 U.S.C. § 2401(b) (1988) (emphasis added).

[9] Bailey v. United States, 642 F.2d 344 (9th Cir. 1981); Casias v. United States, 532 F.2d 1339 (10th Cir. 1976); Caton v. United States, 495 F.2d 635 (9th Cir. 1974); Mann v. United States, 399 F.2d 672 (9th Cir. 1968).

[10] 487 F. Supp. 1033 (N.D. Tex. 1980).

the control of the United States Navy on Guam in June of 1972. No administrative claim was filed with the Navy until May of 1975. Suit followed and at trial, the government argued, inter alia, that the suit was barred by the running of the two-year statute of limitations contained in 28 U.S.C. section 2401(b). The plaintiff-husband argued that because he had been in active military service at the time of the incident and continuously thereafter until October of 1975, he was entitled to the benefits of section 525 of the SSCRA. The government, on the other hand, contended that the tolling provisions of the SSCRA were not applicable to suits brought under the FTCA. The court disagreed, however, noting its application to other claims against the United States and finding no basis to support the government's argument in either the wording or the purpose of the statute.

> The court ... believes that the language of the Act is very specific. The period of military service is not to be included in the computing of any period for the bringing of *any* action by or against any person in the military service. To contend that the Act does not apply in actions brought under the Federal Tort Claims Act would be to defeat its remedial purposes.[11]

Other courts have accepted this proposition and no reported decisions to the contrary exist.[12] Therefore, the SSCRA tolling provision, when it applies, effectively overrides the jurisdictional nature of the statute of limitations applicable to FTCA actions. The same holds true for the MCA, because liability is to be determined in accordance with general principles of tort law common to the majority of United States jurisdictions[13] and the SSCRA by its own terms applies in all United States jurisdictions.[14]

Claimants Protected by SSCRA Tolling

The SSCRA tolling provision applies only to actions or proceedings by or against a person "in military service."[15] While this has been given a broad interpretation in accordance with the remedial purpose of the SSCRA,[16] the tolling provisions clearly will not protect the claims of the soldiers' family members, whether the claims are of a "direct" nature or derive from the soldiers' claim.[17] In *Lester* the soldier's wife had sustained a fall, and the court held that she was not entitled to the benefit of the tolling provision of the SSCRA. Likewise, when a soldier and his wife sued the owner of a ski area for injuries he sustained in a skiing accident, the court held the wife's cause of action for loss of consortium was barred by the statute of limitations, notwithstanding the SSCRA.[18] The court relied on the language of the statute that specifies which parties are to be considered as being in the military service.

> As indicated previously, 50 U.S.C.A. App. 511 enumerates those persons who are in the military service and specifically negates the expansion of that list beyond those designated with particularity therein. We believe that this Act should not be construed to include a wife who brings suit in her own name to recover derivatively for damages she has incurred as a result of injuries suffered by her husband, an individual covered by the Soldiers' and Sailors' Civil Relief Act.[19]

Mandatory Versus Discretionary Tolling

A split of authority exists on the issue of whether some hardship must be demonstrated for a soldier to claim the benefit of the SSCRA's tolling provision. In *Pannell v. Continental Can Co.*[20] the Fifth Circuit held that hardship or prejudice must be shown before a soldier can take advantage of the tolling provision. Nevertheless, *Oberlin v. United States*[21] points out that a majority of courts—both federal and state—have held that the SSCRA tolling provision is mandatory and is applicable whenever active service in the military is shown.[22] Accordingly, *Pannell* has been criticized for incorrectly imposing the requirement in section 521 of the SSCRA that a soldier demonstrate hardship or prejudice to *stay* a proceeding upon section 525, which only requires proof of active military service to invoke the tolling provision. As the court stated in *Oberlin*:

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[11] *Id.* at 1038.

[12] Stephan v. United States, 490 F. Supp. 323 (W.D. Mich. 1980); Oberlin v. United States, 727 F. Supp. 946 (E.D. Pa. 1989).

[13] Army Reg. 27-20, Legal Services: Claims, para. 3-8b (28 Feb. 1990). For claims arising in a foreign country, liability of the United States is determined by reference to general principles of American law. The MCA has limited applicability to tort claims arising in the United States because these claims first are considered under the FTCA. *See id.*, para. 3-5a.

[14] 50 U.S.C. App. § 525 (1988).

[15] *Id.*

[16] Clark v. Mechanics' Am. Nat'l Bank, 282 F. 589 (8th Cir. 1922) (construing predecessor to current statute); Amen v. Crimmins, 379 F. Supp. 777 (N.D. Ill. 1974).

[17] Ray v. Porter, 464 F.2d 452 (6th Cir. 1972); Card v. American Brands Corp., 401 F. Supp. 1186 (S.D.N.Y.); Lopez v. Waldrum Estate, 460 S.W.2d 61 (Ark. 1970).

[18] Wanner v. Glen Ellen Corp., 373 F. Supp. 983 (D. Vt. 1974).

[19] *Id.* at 986 (citations omitted).

[20] 554 F.2d 216 (5th Cir. 1977).

[21] *Oberlin*, 727 F. Supp. at 947 n.1.

[22] *Id.* at 947 n.1.

> Congress' phrasing of another section of the SSCRA is consistent with the view that § 525 applies to all servicepeople, regardless of their actual opportunity to bring or defend claims. In [section 521], Congress provides servicepeople with a stay of proceedings on the explicit condition that their military service affects their ability to prosecute or defend an action. In significant contrast, § 525 lacks such a condition, giving rise to the inference that Congress intended the section to apply to all servicepeople.[23]

The better reasoning, which is supported by the clear weight of authority, is that the tolling provision is mandatory. Accordingly, on MCA claims and—with the exception of the Fifth Circuit—on FTCA claims, no evidence of hardship should be required for the tolling provision to apply.

Tolling for Derivative Claim When Direct Claim Barred

Because most direct tort claims against the United States by soldiers are barred by the *Feres* doctrine, the importance of the SSCRA tolling provision to FTCA and MCA claims would be minimal if a soldier's derivative claim could not be asserted when the direct claim is time-barred.[24] No courts, however, have accepted this argument with respect to section 525 of the SSCRA, and most of the decisions that address the issue mention it only in passing.[25] In *Beck v. United States*,[26] however, the court said a good deal more. A minor plaintiff, Amanda Beck, and her father, Henry, brought an FTCA action for negligent administration of a Diptheria-Pertussis-Tetanus (DPT) vaccine to Amanda as a newborn. The negligent administration of the vaccine resulted in seizures, convulsions, and brain damage. The incident occurred in 1979, while both Henry Beck and Amanda's mother were on active duty in the Navy. On February 5, 1985, the parents watched a television program that presented evidence of a causal connection between DPT vaccinations and brain damage. Shortly thereafter, Mr. Beck filed two administrative claims with the Navy. One was on behalf of Amanda for her injuries, and one was for his own injuries for having to provide hospital, medical, and other special care for Amanda.

Suit followed and the government moved to dismiss based on the statute of limitations. Plaintiffs failed to respond to the motion within the allotted time and an extension. The court thereupon granted the government's motion, but plaintiffs then moved to alter or amend the judgment under Federal Rule for Civil Procedure 59. Among the arguments raised by the plaintiffs was that Mr. Beck's cause of action was subject to the protection of section 525 of the SSCRA, and that, accordingly, the statute of limitations should have been tolled until his discharge from the Navy in June of 1985. In finding Mr. Beck's claim to have been filed timely based upon SSCRA tolling, the court engaged in a considerable discussion of the issue and a review of the relevant case law.

> The government argues that once I have determined that Amanda's claim is time-barred, it follows that Henry's claim, which is "derivative" of Amanda's, must also be time-barred. The word "derivative" seems to take on several meanings in the cases. The common denominator is that a derivative claim is one that would not exist but for the injury to the direct claimant, who in this case is agreed to be Amanda. After admitting that no case squarely addresses the question of whether a serviceman is entitled to invoke the tolling provisions of the Soldiers and Sailors Civil Relief Act when his claim is derivative of one that is time-barred, the government urges me to adopt such a rule. Both sides to this case agree that in general the rule is that when a direct claim is barred for some reason (such as contributory negligence), the derivative claim is also barred. The idea is that most defenses apply equally well to the derivative claim as to the direct claim. The general rule ought to be different, though, when a defense applies to the derivative claimant differently than it applies to the direct claimant, as can be the case with statutes of limitations. The defense of statute of limitations applies to Amanda differently than it applies to Henry because Henry, and not Amanda, may invoke the tolling provisions of the Soldiers and Sailors Civil Relief Act. Consequently, courts have held the derivative claims of servicemen timely on account of tolling even though the direct claims themselves were time-barred. By contrast, when a defense is not personal to the direct plaintiff, and applies equally well to both the direct claim and derivative claim, the defense will bar both claims.

The government attempts to distinguish cases like *Card*, *Lester*, and *Lopez*—which hold that a serviceman's derivative claim may be timely even

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[23] *Id.*

[24] *See, e.g.*, Pioneer Constr. Co. v. Bergeron, 462 P.2d 589 (Colo. 1969) (discussing rule that contributory negligence of spouse bars recovery of derivative damages by other spouse).

[25] *See* cases cited *supra* note 17.

[26] No. 86 C 10134, (N.D. Ill., May 26, 1987), *judgment amended*, (Sept. 14, 1987).

though the direct claim is time-barred—on the grounds that in those cases the servicemen were seeking to prosecute personal claims such as loss of consortium following a wife's personal injuries. But that is precisely the type of claim Henry is pursuing here. The government apparently fails to realize that Henry's claim in Count II is for his personal injuries; specifically, his injuries in having to maintain the medical, hospital, and vocational care for Amanda. Such injuries are indeed personal since, under Illinois law, a parent is legally responsible for the support of his or her minor child. *See* Ill. Rev. Stat. ch. 23, P 10-2. Thus, this case is just like *Card*, *Lester*, and *Lopez*, rather than distinct from. Consequently, Henry is entitled to tolling until June 10, 1985 for his claim for the injuries personal to him in having to expend additional sums in support of Amanda. In short, his claim in Count II is timely.[27]

The court proceeded to find that both Mr. Beck's and Amanda's claims were timely under the "discovery" rule applicable to medical malpractice claims under the FTCA.[28] Therefore, the entire discussion of section 525 of the SSCRA could be considered dicta. Nevertheless, the analysis used by the court is persuasive and consistent with the body of case law on the issue.

Elements of Damages Preserved by Operation of the SSCRA Tolling Provision

Having concluded that soldiers' derivative claims are protected by the SSCRA tolling provision when the direct claims and other derivative claims are barred by the statute of limitations under the FTCA, the issue becomes one of identifying the elements of damages that "belong" to the soldier, who usually is the parent or spouse of the direct claimant. In an action under the FTCA, these elements of damages are determined by reference to state law.[29] For instance, the active-duty military plaintiff-husband in *Lester* was awarded $50,000 in damages for loss of consortium, whereas his wife's claim for damages personal to her, and both plaintiffs' claims for damages that would be considered community property, were barred by the statute of limitations.[30]

The law, however, varies considerably among the states. Therefore, claims attorneys are well advised to research the local law carefully. For example, mental anguish normally is not recoverable by family members of an injured person, but local law may be to the contrary.[31] The fact that the parents of an injured child witnessed the accident—or, thereafter, the injuries—may lead to a cause of action for mental anguish.[32] Similarly, damages for the cost of future medical care of an injured child may be recoverable by the infant, whose claim may be barred by the statute of limitations, or by the parent-soldier, whose claim may be preserved by the tolling provision of the SSCRA.[33] A parent's loss of a child's consortium also may be compensable,[34] although this is a minority view.[35]

Conclusion

Claims that appear to be barred by the statute of limitations often are filed with the Army. One of the worst mistakes a claims attorney can make is to assume that a claim is barred based merely on the time elapsed between the date of the incident and the date of the claim. Even when a claim clearly appears to be barred by the statute of limitations based on its facts, the tolling provision of the SSCRA could preserve the claim if the claimant is a former soldier and the claim is not barred by an "incident to service exclusion."

Therefore, if claims appear to be barred by the applicable statute of limitations, the claims attorney or investigator first should ascertain whether any of the claimants have been, or currently are, soldiers. Second, if any of the claimants are or were soldiers, the claims attorney or investigator should determine whether they are barred from filing a claim because of an "incident to service" exclusion. Third, if the soldiers are not barred from filing the claim, then the claims attorney or investigator should obtain a copy of the soldiers' Official Military Personnel File (OMPF) or Military Personnel Records Jacket (MPRJ) to determine whether a period of active military service existed during which the statute of limitations was tolled under the provisions of the SSCRA.[36] Fourth,

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[27] *Id.* at 7-9 (case citations omitted).

[28] *See* United States v. Kubrick, 444 U.S. 111 (1979).

[29] Williams v. United States, 350 U.S. 857 (1955); Hoffman v. United States, 767 F.2d 1431 (9th Cir. 1985).

[30] *Lester*, 487 F. Supp. at 1039-41. The court found the law of Texas—the marital domicile—to be controlling on issues of damages.

[31] Betancourt v. J.C. Penney Co., 554 F.2d 1206 (1st Cir. 1977) (Puerto Rico); *see also* Schales v. United States, 488 F. Supp. 33 (E.D. Ark. 1979) (mental anguish of survivors recoverable in wrongful death case only when more than the "normal" amount). At least three states permit recovery of mental anguish damages by statute. *See* Idaho Code § 5.3120-11 (1979); Iowa Code Ann. § 8 (1974); Wash. Rev. Code Ann. § 42.24.010 (1975).

[32] Reben v. Ely, 705 P.2d 1360 (Ariz. App. 1985); Hay v. Medical Center Hosp. of Vt., 496 A.2d 939 (Vt. 1985).

[33] McNeill v. United States. 519 F. Supp. 283 (D. S.C. 1981).

[34] This is provided by statute in Iowa. *See* Iowa Code Ann. § 613.15 (1974); Audobon-Exira Ready Mix, Inc. v. Illinois Cent. Gulf R.R., 335 N.W.2d 148 (Iowa 1983); Berger v. Weber, 267 N.W.2d 124 (Mich. 1978), *aff'd*, 303 N.W.2d 424 (Mich. 1981); Ferriter v. Daniel O'Connell's Sons, Inc., 413 N.E.2d 690 (Mass. 1980); Ueland v. Reynolds Metals Co. v. Pengo Hydra-Pull Corp., 691 P.2d 190 (Wash. 1984).

[35] Restatement (Second) of Torts § 707 A; *see* 11 A.L.R. 4th 549 (1982); Norwest v. Presbyterian Intercommunity Hosp., 652 P.2d 318 (Or. 1982); Salin v. Kloempken, 322 N.W.2d 736 (Minn. 1982); Hibpshman v. Prudhoe Bay Supply, Inc., 734 P.2d 991 (Alaska 1987); *Hay*, 496 A.2d at 939.

[36] If the soldier is still on active duty, a copy of the MPRJ can be obtained by sending a written request to the soldier's servicing military personnel office. If the soldier has left the service, either through ETS or retirement, the OMPF can be obtained from the National Personnel Records Center, 9700 Page Boulevard, St. Louis, MO 63132.

if the SSCRA is applicable and saves the claim from being barred by the statute of limitations, then the claims attorney or investigator must investigate the facts of the claim fully to determine whether negligence occurred for which the United States is liable. Finally, if the claim is determined to be meritorious, the claims attorney or investigator must research the applicable law to determine which elements of damage are recoverable by the soldier-claimant.

Tort Claims Note

Individual Tort Liability of Army Health Care Providers

Claims personnel should be aware of important recent developments in three areas regarding the tort liability of military health care providers (HCPs). As a general rule, military HCPs—such as physicians, dentists, nurses, paramedicals, pharmacists, medical and dental technicians, nursing assistants, and therapists—acting within the scope of their employment are considered to be federal employees. They are thereby immune from individual liability or they can be held harmless for their negligent or wrongful acts or omissions committed within the scope of their employment. In this context, "military HCPs" means individuals who are members of the armed forces or actually employed by them—*not* independent contractors such as Civilian Health and Medical Program of the Uniformed Services (CHAMPUS) partners.

The first area in which a recent development has arisen concerns liability of military HCPs practicing overseas. Recently, the immunity from suit of military HCPs providing care in United States military facilities in foreign countries was challenged in federal courts. In *United States v. Smith*, 111 S. Ct. 1180 (1991), plaintiffs argued that the 1989 amendment to the Federal Tort Claims Act (FTCA), 28 U.S.C. § 2679 (1988), which immunizes a United States employee from suit when he or she is certified to have been acting in the scope of employment, did not apply to military HCPs overseas. The plaintiffs had contended successfully before the United States Court of Appeals for the Ninth Circuit that the amendment could not apply because immunizing the military HCPs, and substituting the United States for the HCPs in the suit, would leave claimants without a judicial remedy because the FTCA "foreign country exception" would bar suit against the United States after it had been substituted.

The Supreme Court rejected the argument, holding that the HCP was immune under section 2679, even if the end result was that the plaintiff had no remedy at all. The Supreme Court in *Smith* also stated that the 1989 amendment to 28 U.S.C. section 2679 did not, by implication, repeal the Gonzales Act, 10 U.S.C. § 1089(f) (1988), which indemnifies military HCPs for successful judgments against them. Of course, administrative claims in these instances still may be asserted against the United States under the Military Claims Act, 10 U.S.C. § 2733 (1988), or the Foreign Claims Act, 10 U.S.C. § 2734 (1988), though neither provide a judicial remedy. For claims personnel and military HCPs, *Smith* is extremely significant because it rebuffs a major challenge and preserves the status quo.

The second area concerns military HCPs who, as part of their military duties, provide care outside of federal facilities to nonfederal recipients. Typical examples include military HCPs in residency programs with nonfederal civilian medical facilities and members of the Army Reserve or National Guard conducting federal training in nonfederal medical facilities. In both instances, potential claimants may be civilian nonfederal patients who are unaware of the military HCP's status.

Claims personnel should be aware that the Department of Justice (DOJ) views military HCPs' performance of medical training in nonfederal civilian institutions to be within the scope of employment for tort liability purposes *if performed pursuant to military orders.* DOJ, however, currently views this training, when performed on permissive temporary duty, as being for the individual HCP's benefit—not for the United States' benefit—and probably would not consider it to be within the scope of employment.

If the training of military HCPs in civilian nonfederal institutions is pursuant to military orders, claimants can assert claims against the United States under the FTCA for care given by military HCPs in the United States. Claims personnel should be aware, however, that both the military HCPs and the United States still retain certain FTCA protections. These protections could include DOJ representation of the HCPs, removal from state courts, substitution of the United States as a party for the military HCPs, and protection for the military HCPs under the Gonzales Act. The protections also could include assertion of defenses on behalf of the United States, the factual basis of which should be developed during the claims investigation. An example is the "borrowed servant" defense. Under this defense, the United States may claim that the nonfederal training institution "borrowed" the military HCPs involved, and that the institution—not the United States—is liable for the acts or omissions of the military HCPs.

Staff judge advocates involved in reviewing agreements for federal training of Reserve and National Guard military HCPs in civilian nonfederal training institutions should ensure these agreements are patterned after similar agreements developed by The Surgeon General for training of active duty personnel. The agreements should ensure that all parties are aware of the extent to which the United States may be liable and the method by which a claim against the United States may be processed. The agreements should provide for cooperation between the training institution and the United States in the investiga-

tion of all claims that are filed, to include access to all medical records and the right to interview all witnesses.

Any involvement of military HCPs in events in non-federal civilian training institutions that are likely to give rise to a claim being filed—that is, potentially compensable events—should be reported directly to the Chief, Tort Claims Division, United States Army Claims Service, Fort George G. Meade, MD 20755-5360, by the most expeditious means (commercial telephone: (301) 677-7804/7854; DSN: 923-7804/7854). This will permit expeditious investigation and processing. Delays in reporting can affect adversely the legal and financial liability of the United States and the military HCPs.

The third area concerns Red Cross volunteers in military health care facilities. In accordance with a memorandum of understanding (MOU) between DOJ and the Department of Defense, certain Red Cross volunteers now are considered employees of the United States for the purposes of tort liability. Claims personnel must be aware, however, that not all Red Cross workers fall under this MOU. Red Cross volunteers must meet the criteria set forth in paragraph 2-42 of Army Regulation 40-3, Medical Services: Medical, Dental, and Veterinary Care (15 Feb. 1985) [hereinafter AR 40-3], as amended by message, Office of The Surgeon General, DASG-JA, 041145Z Feb 91, subject: American Red Cross Volunteers. Although Army Regulation 27-20, Legal Services: Claims (28 Feb. 1990), will be changed to reflect this with the printing of the next update, claims personnel should consider Red Cross volunteers who meet the criteria of AR 40-3 and who are acting within the scope of their voluntary employment as federal employees for the purposes of tort liability for their acts that have taken place on or after 4 February 1991. Lieutenant Colonel Kirk and Mr. Rouse.

Personnel Claims Note

Turning In Items to Defense Reutilization and Marketing Offices

A few claims offices are having trouble with the procedures established for claimants who are to turn in items with salvage value to Defense Reutilization and Marketing Offices (DRMO), outlined in paragraph 11-13*e* of AR 27-20 and in paragraph 2-44*a* of Department of the Army Pamphlet 27-162, Legal Services: Claims (15 Dec. 1989) [hereinafter DA Pam 27-162]. Claimants often delay turning in items, and some claimants change their minds and decide to retain items they intended to turn in. Some offices hold claims open for inordinate lengths of time, waiting for the claimant to act. Other offices mistakenly settle claims immediately, before the claimant has had an opportunity to turn in an item, and then reopen the file on reconsideration to pay the claimant the salvage value deducted from the "final" payment.

Claims examiners are required to identify "destroyed" items having a salvage value over twenty-five dollars. Except for shipment claims involving increased released valuation—in which the carrier is entitled to pick up salvageable items—claims personnel must query the claimant to find out if the claimant wants to retain the item, and then either deduct salvage value or have the claimant turn in the item. In exceptional cases, when the difficulty in effecting turn-in outweighs an item's salvage value because of distance or the size of the item, the claims judge advocate may determine that an item's salvage value is less than twenty-five dollars. He or she then may authorize other means of disposal. Sound discretion prohibits requiring a claimant living far from a DRMO to turn in an item of relatively slight value. *See* DA Pam 27-162, para. 2-44*a*.

Except in unusual circumstances, claims personnel should *not* pay a claim in full and then ask the claimant to turn in items for salvage. Nor should claims personnel hold a claim open for months, waiting for a claimant to turn in an item as agreed. On the other hand, paying a claimant based on retention of an item and then informing that claimant that he or she will be entitled to further payment if he or she turns in items is equally inappropriate. Claims personnel must afford the claimant an opportunity to decide whether to retain items before the claim is settled.

If the claimant wants to turn in the item, the claims office should provide the claimant with the necessary DRMO paperwork and tell the claimant that if he or she does not turn in the item and return the paperwork to the claims office within a given period of time—usually fourteen days—the claims office will assume that the claimant wants to keep the item and settle the claim after deducting a stated amount for salvage value. This approach minimizes problems with turn-in. Mr. Frezza.

Personnel Claims Recovery Notes

Code J Unaccompanied Baggage Liability

At least one carrier has asserted that Code J shipments are covered under the "Joint Military-Industry Agreement on Carrier Recovery on Code 5 and T Shipments," and has been offering a fifty percent compromise of the amount the Army determines to be due.

Despite statements by carriers to the contrary, the "Joint Military-Industry Agreement on Carrier Recovery on Code 5 and T shipments" does *not* apply to Code J shipments. A Code J shipment involves surface transportation by the Code J carrier from origin to a Military Airlift Command (MAC) terminal, air transportation—usually overseas—by MAC, and surface transportation by the Code J carrier to destination. The "last handler" rule applies to these shipments. Unless the Code J carrier takes valid exceptions on a *proper* rider signed by a

MAC official showing that damage occurred while the property was being transhipped by MAC, the Code J carrier is fully liable for all loss and damage. Mr. Frezza.

Carrier Liability for Missing Packed Items

An article in the April 1989 issue of *The Army Lawyer*, entitled "Carrier Liability For Items Missing From Carrier-Packed Cartons," noted that the General Accounting Office probably would uphold offset action against a carrier who failed to deliver an item packed in a carton if the required missing items statement appeared on DD Form 1842, the move only involved one carrier, and the claim otherwise was substantiated.

A 1990 United States Army Claims Service (USARCS) message, 121400Z Feb. 90, subject: Letter To Be Used By Claimant For Recovery Purposes, again discussed this subject. USARCS advised claims offices that even though a preprinted missing items statement appeared on DD Form 1842, the office's obtaining a separate statement from the claimant and including this statement in the demand packet forwarded to the carrier was mandatory. USARCS suggested the following wording:

> The following items were missing at delivery of my household goods. They were items I owned and used prior to the move but were not delivered at destination by the carrier. After my household goods were packed at origin, I checked all rooms in the house to make sure nothing had been left behind. All items had been packed by the carrier.

The message also required claims offices to include inventory numbers and item descriptions in the statement, along with the date and the signature of the claimant. In addition, the message encouraged offices to obtain any additional information the claimant had about the loss.

In December 1990, the issue of carrier liability for missing carrier-packed items surfaced again in the form of a Comptroller General decision. It was not favorable. In *Aalmode Transportation Corp.*, Comp. Gen. Dec. B-240350 (Dec. 18, 1990), a three-pound Sony "Discman" portable compact disc player was missing from a thirty-five pound, 4.5 cubic foot carton labelled "knickknacks." Aalmode Transportation denied liability, contending that electronic equipment always was included in the general description on the inventory, and that knickknacks never were packed with electronic equipment. USARCS contended that the missing Sony Discman weighed only three pounds and was similar in size to a "Walkman" radio. Because the smallest approved carton was twenty-five pounds, USARCS pointed out that a three-pound item would not be packed by itself, nor listed individually on the inventory. USARCS noted that packing the item in a thirty-five-pound carton labelled "knickknacks" was not inappropriate. USARCS also cited the missing items statement as evidence that the item was tendered to the carrier at origin.

The Comptroller General decided that the evidence was insufficient to establish that the compact disc player had been tendered to the carrier at pickup. He noted that to shift the burden of proof to the carrier, the Army must establish proof of tender, which is the first element of a prima facie case of carrier liability. The Comptroller General found that the Army failed to prove that the Discman actually had been tendered to the carrier.

The Comptroller General noted that the only evidence of tender was the statement of loss, which was preprinted on the standard claims form, and that this was insufficient to establish proof of tender. He also noted that no evidence existed that the tape on the cartons had been tampered with, nor had the shipper produced evidence of ownership—such as a sales receipt, a cancelled check, or a credit card invoice—even though the item was purchased shortly before the move.

The Comptroller General referred to a 1983 opinion on the subject of missing carrier-packed items, *Paul Arpin Van Lines, Inc., Department of the Army Request for Reconsideration*, Comp. Gen. Dec. B-205084 (June 8, 1983), which said:

> We did not intend by our decision to place an onerous burden on the shipper to require the shipper to offer absolute proof of tender.... Rather, our reading of the applicable case law ... led us to the conclusion that where the issue of whether goods were tendered is raised (by the carrier) the shipper must present at least some substantive evidence of tender as an element of his *prima facie* case....
>
> We reasoned that the shipper would have personal knowledge of the circumstances surrounding the tender and could supply a specific statement concerning the loss.

In the *Aalmode* case, the Comptroller General found that the standard missing items statement did not

> constitute a personal rendition of facts or understanding concerning the loss, but simply complete[d] the creation of evidence intended by the agency to establish tender in all situations irrespective of what actually might have occurred.... [W]here the only proof of delivery to the carrier, for purposes of establishing a *prima facie* [case] against the firm, is a statement by the shipper, that statement must reflect some personal knowledge of the circumstances of tender.

The Comptroller General concluded that the standard missing items statement failed to establish personal knowledge of the circumstance surrounding packing and tender of the item. In *Aalmode*, however, the Comptroller General also noted that "... every household good need not be listed on the inventory, a carrier can be charged with loss where other circumstances are sufficient to establish that the goods were shipped and lost."

Accordingly, the question remains, what evidence is necessary to convince the Comptroller General that the carrier is liable for missing carrier-packed items? The answer appears to be as much evidence as the claimant can muster to support his or her case.

Does the claimant have register receipts, credit card invoices, cancelled checks, or family pictures of the items that can be included in the file to help establish proof of ownership? Can he or she provide statements from witnesses who saw the missing items in the possession of the soldier prior to the move? Does any evidence of carton tampering exist? Was a different color of tape used? Was the carton resealed? Was the claimed missing item identified to an appropriate carton? (For example, the Comptroller General has upheld offset action for a missing pair of golf shoes, even though the carton was delivered sealed, because the missing golf shoes were identified to a carton of shoes that the carrier had packed. *See Paul Arpin Van Lines, Inc.*, Comp. Gen. Dec. B-213784 (May 22, 1984)). Does the file include a signed, dated statement on paper other than DD Form 1842 that contains the basic elements of the missing items statement but also is more personal and more detailed? Does the statement explain what specific memories the soldier had of the item being packed by the carrier? Did the soldier place the item in a special room? Did he or she talk to the carrier about it? Why is the soldier really positive that he or she actually tendered the item to the carrier?

If the soldier's statement discussing tender of the missing items answers the questions posed above; is detailed, personal, and convincing; and is accompanied by other substantive evidence of ownership, the Army successfully should be able to accomplish carrier liability for missing packed items—liability that should be upheld by the Comptroller General. Ms Schultz.

Affirmative Claims Note

Statutes of Limitations Applicable to Claims Under the Federal Medical Care Recovery Act

The government has an independent right to recover under the Federal Medical Care Recovery Act (FMCRA). Pursuant to 28 U.S.C. section 2415(b), the government must litigate medical care claims based on a tort theory under the FMCRA within three years "after the right of action first accrues," or these claims are barred. The statute of limitations applicable to the government's right to recover, however, often will differ from the statute of limitations applicable to the injured party. Claims offices that automatically close claims "more than three years old" often may be cutting short viable claims.

An FMCRA claim normally accrues on the date that treatment first is provided. The United States has no right to recover under the FMCRA until the injured party receives medical care that the United States has an obligation to furnish. While this date can be the date that the injured party was injured, in some cases the injured party may not obtain treatment until days or even weeks later, and the three-year statute of limitations applicable to the government's independent right would not commence until then.

Of greater import in computing the three years, however, is the provision in 28 U.S.C. section 2416(c) that excludes periods of time during which "facts material to the right of action are not known and reasonably could not be known by an official of the United States charged with the responsibility to act under the circumstances." This section effectively tolls the statute of limitations until the United States official charged with enforcing the FMCRA learns that someone entitled to medical care was injured under circumstances creating a tort liability, or reasonably could have learned of these circumstances. *See United States v. Hunter*, 645 F. Supp 758, 760 (N.D.N.Y. 1986).

If, for example, a family member is treated in a civilian hospital that bills the government under CHAMPUS, often no "official of the United States" will be aware that a cause of action exists until months or even years after treatment was provided. Often, the government has no way of knowing of "facts material to a right of action" until the CHAMPUS fiscal intermediary finally forwards information to the claims office.

Similarly, if a civilian hospital provides emergency care to a soldier under a Civilian-Military Contingency Hospital System contract, often no official charged with enforcing the FMCRA has any reason to know of the incident until the hospital treasurer's office receives the bill. In these situations, the three-year statute of limitations applicable to the government's independent right of action under the FMCRA would be tolled.

When asserting claims under the FMCRA, rather than under a third-party beneficiary theory, claims personnel should not close these claims automatically as more than three years old based on the date of the injury—or even based on the date treatment first was provided—but instead should determine carefully whether the statute of limitations has run in light of 28 U.S.C. section 2416. Mr. Frezza.

Management Note

Mailing Address for United States Army Claims Service

The Fort George G. Meade Installation Mail and Distribution Center is using the United Parcel Service (UPS) for mailing packages and bulk shipment items. Because of UPS's requirements, all mail they carry must contain a return address and a delivery address indicating the commander or director, unit or activity name, office symbol, street name, building number, room number, city, state, and nine-digit zip code. To reduce delays or losses in mailing, please address all mail being sent to the United States Army Claims Service as follows:

Commander
United States Army Claims Service, OTJAG
ATTN: JACS-(Office symbol)
Building 4411, Room 206
Llewellyn Avenue
Fort George G. Meade, MD 20755-5360

This includes packages being sent through the United States Postal Service and first class letters. Lieutenant Colonel Thomson.

Labor and Employment Law Notes

OTJAG Labor and Employment Law Office, FORSCOM Staff Judge Advocate's Office, and TJAGSA Administrative and Civil Law Division

Attorneys' Fees

Authority of Agency Representative to Award Attorneys' Fees in Settlement

The Merit Systems Protection Board (MSPB or Board) remanded a settlement agreement after the agency petitioned for review, arguing that its attorney representative lacked authority to allow attorney fees in excess of a set amount. The appellant and agency representative had entered an agreement that settled the appellant's appeal and authorized $40,000 in attorneys' fees. The agency appealed, arguing that an internal policy existed which required that attorneys' fee settlements in excess of $20,000 be approved by the agency solicitor. The Board recognized that the doctrine of apparent authority does not apply to the government, and that the government is not bound by the unauthorized acts of an agent. It did note, however, that express or implied actual authority does bind the government. Therefore, it remanded the appeal to the regional office to hear evidence on the issue of actual authority. *Wesselhoft v. Department of Interior*, 46 M.S.P.R. 594 (1991).

A good practice is to resolve all issues, such as attorneys' fees, in a settlement agreement. The agency representative should ensure that the appellant's attorney has provided accurate and current time records and a copy of the terms of any fee agreement. The agency representative also should document that the fees are in accordance with the prevailing community rate.

Arbitrator Improperly Reduced Both Hours and Rate for Union Attorneys

In reviewing union exceptions to an arbitration award, the Federal Labor Relations Authority (FLRA or Authority) reaffirmed its precedent and also ruled on issues of first impression. In rescinding a one-day suspension of the grievant, the arbitrator had ruled that the prevailing union was entitled to attorneys' fees. He determined, however, that the four union-employed attorneys involved were not entitled to the prevailing market rate but, instead, to fees on a cost-plus basis—that is, salary plus an equal amount for overhead. He also reduced the hours requested by the lead counsel from 304.28 to 200, explaining only that the lower figure was "more reasonable." He declined to award fees to another attorney whose involvement was limited to briefing an argument raising constitutional issues. The arbitrator had reasoned that fees for that task were unwarranted because he had not relied on that argument in rendering his award. The arbitrator also had declined to award fees to the union's general counsel, who had claimed reimbursement for supervising and advising the attorneys actually appearing in the case. The Authority, however, reversed all of the arbitrator's findings. Specifically, the Authority adhered to its earlier rulings that any reduction in hours or hourly rate must be accompanied by a reasoned justification. Because the arbitrator had not provided that, the FLRA remanded the question of compensable hours by the lead attorney to the arbitrator to issue a reasoned decision.

The FLRA applied Supreme Court case law for the proposition that a court's failure to consider an alternative legal argument presented in good faith is not sufficient justification for rejecting an attorney fee request for work on that argument. It therefore remanded this issue to the arbitrator for a determination of reasonable hours and fees to satisfy the fee request from the attorney who had worked the constitutional issue.

On the question of the entitlement of the attorneys' supervisor to fees, the Authority ruled that "the Arbitrator's determination that administrative and supervisory activities [are] not compensable is not a sufficient basis under the Back Pay Act for denying an award of attorney fees." To deny fees for the supervisory attorney, the arbitrator must find that the supervisor's functions were either unrelated to the case or were duplicitous of the work performed by his subordinates. Accordingly, the Authority remanded for a determination on that issue. Finally, it rejected the cost-plus formula for determining fee amount. It adhered to earlier case law that permits market rate awards to union attorneys so long as the attorneys are obligated to turn over to their union only the actual costs incurred by the union in providing the attorneys. It remanded that issue for a determination of the appropriate market rates for the attorneys in question. *Overseas Educ. Ass'n and United States Dep't of Defense Dependents Schools*, 39 F.L.R.A. 1261 (1991). Labor counselors should contrast the FLRA's position with the position of the Merit Systems Protection Board (MSPB). Under the MSPB authority, fees awarded to union attorneys under 5 U.S.C. sections 7701(g)(1) and 7701(g)(2) are limited to the cost-plus-overhead formula. *See, e.g., Kean v. Department of the Army*, 41 M.S.P.R. 168 (1989).

Labor Law

Arbitrator Orders Discipline of Supervisor

The FLRA considered agency exceptions to an arbitration award that had ordered an unusual remedy. The arbitrator found that management violated the collective bargaining agreement (CBA) when a second-line super-

visor required the grievant to remain at his post for four hours after the end of his shift, despite the grievant's request to leave to take care of a medical condition. The grievant, a diabetic, made repeated requests to his supervisor to be relieved. He eventually collapsed and required medical treatment. The arbitrator also found that the supervisor had harassed the employee during the grievant's attempts to be relieved. Accordingly, the arbitrator sustained the grievance and, as a remedy, ordered the supervisor to provide the grievant a written apology and to attend sensitivity training. He also ordered the agency to issue a written reprimand to the supervisor and to provide a copy of it to the grievant.

The Authority sustained all aspects of the remedy except furnishing the reprimand to the grievant. It concluded that disclosure of the reprimand would constitute an unwarranted invasion of the supervisor's privacy that would violate the Privacy Act. The FLRA ruled, however, that ordering the apology was within the authority of the arbitrator because that remedy followed from the issues before him.

The Authority refused to consider the issue of whether an inconsistency with another arbitration award constituted a ground for review. Specifically, the FLRA reiterated that arbitration awards have no precedential value. It also rejected numerous agency arguments against the reprimand, noting that while 5 U.S.C. section 7106 preserves management's right to discipline "employees," supervisors are not "employees" under the labor-management relations statute. It also spurned management's unsupported arguments that the remedy was improperly "punitive." The Authority found that the training order was a permissible enforcement of an appropriate arrangement—that is, the CBA requirement that employees be permitted to bring matters of personal concern to management. It concluded that the arbitrator's enforcement of the CBA did not abrogate management's right to assign work. *United States Dep't of Justice, Fed. Bureau of Prisons, United States Penitentiary, Lewisburg, Pa. and Am. Fed'n of Gov't Employees*, 39 F.L.R.A. 1288 (1991).

Past Practice Prevails Over CBA Language

On remand from the United States Court of Appeals for the District of Columbia Circuit, the FLRA considered whether management had violated 5 U.S.C. section 7116 by unilaterally changing a condition of employment. The applicable CBA contained a bank of hours for use by union representatives for representational activities such as processing grievances. Nevertheless, a consistent practice had arisen, permitting union officials virtually unlimited official time for those functions. The agency had announced its intention to enforce the literal terms of the CBA and had refused to bargain over the change. Following earlier case law, the Authority ruled that a binding past practice had arisen, and that the agency unilaterally could not enforce CBA language that is in conflict with the practice. It ordered a make-whole remedy for employees adversely affected by the change and ordered the parties to bargain over the proposed decision to adhere to the terms of the CBA. *United States Patent and Trademark Office and Patent Office Professional Ass'n*, 39 F.L.R.A. 1477 (1991).

Civilian Personnel Law

Continuing Expansion of Whistleblower IRAs

In *Horton v. Department of the Navy*, No. SF122190W0828 (Mar. 26, 1991), the MSPB held that the Whistleblower Protection Act (WPA) does not condition the individual right to appeal (IRA) on the exhaustion of equal employment opportunity (EEO) administrative remedies.

In the initial decision, the administrative judge (AJ) dismissed the appeal from termination during probation, holding that because the appellant had filed a formal EEO complaint, his appeal right to the Board did not vest until either the agency issued a final decision on the complaint or 120 days elapsed. The AJ's decision was based primarily on judicial economy because both the MSPB and EEO cases were based on the same personnel action and the same set of facts. The Board reversed and, after a discussion of the legislative history behind the WPA, noted that the only exhaustion requirement that Congress intended to be imposed on these actions is that the employee first seek the assistance of the Special Counsel.

This case should not be confused with *Williams v. Department of Defense*, 46 M.S.P.R. 549 (1991), in which the Board held that filing an EEO complaint does not amount to a protected disclosure warranting protection under the WPA in addition to the reprisal protections already in place under title VII.

Removal for Unsatisfactory Performance Under Chapter 75

In *Bowling v. Department of the Army*, 47 M.S.P.R. 379 (1991), the Board addressed a removal action under chapter 75 for unsatisfactory performance. In *Bowling* the Army removed an occupation health nurse based upon a charge of "violation of administrative rules or regulations where safety to persons or property is endangered." The agency's charge was based on the fact that the employee transferred audiometric test data incorrectly in twenty-one instances on a review of eighty-eight files. The AJ found that the employee had committed eighteen of the twenty-one errors and upheld the removal. The Board initially remanded the decision, noting that while agencies are free to use chapter 75 for unsatisfactory performance, they may not charge that an employee should have performed better than the standards communicated to him or her. The AJ had not ruled whether the number

of errors cited by the agency would constitute unsatisfactory performance under the standards.

On remand the AJ confirmed his earlier decision, noting that the employee's performance was unsatisfactory under her standards. Upon its considering another petition for review, the Board again reversed and ordered the employee reinstated. Based on the employee's uncontested assertion that she administered 1400 hearing tests, the Board noted that the sample of eighty-eight tests constituted less than seven percent of the tests administered. The Board, while noting that the agency need not have analyzed all 1400 tests, found that the agency should have shown that the representative sample was achieved through some objective, systematic method for selecting examples of employee performance. The Board therefore held that the agency's evidence failed to prove the charge against the appellant and ordered her reinstatement and back pay for a period of almost three years.

Bowling is good and bad news for labor counselors. Using chapter 75 for unsatisfactory performance undoubtedly remains permissible. Under chapter 75, a removal action is relatively quick because the employee need not be afforded a performance improvement period, as is the case under chapter 43. While chapter 75 actions may be necessary in upcoming drawdowns, they should not be used to attempt to overcome a circumstance in which management has established poor standards or in which the evidence of unsatisfactory performance is incomplete.

Criminal Law Division Notes

OTJAG Criminal Law Division

Supreme Court—1990 Term, Parts III and IV

Colonel Francis A. Gilligan and Lieutenant Colonel Stephen D. Smith

Part III: Seizure and the Fleeing Suspect

In *California v. Hodari D.*[1] a seven-member majority of the United States Supreme Court ruled that an officer's pursuit of a fleeing suspect was not a seizure within the meaning of the fourth amendment. Justice Scalia's majority opinion held that, in the absence of any physical contact with the suspect, a show of authority to which a suspect does not yield is not a seizure. The majority also noted that applying the exclusionary rule to instances in which the apparent authority of the law enforcement officer is ignored would be a bad policy.[2]

Four or five youths, including the defendant, Hodari D., were huddled around a small car parked at the curb in a high crime area in Oakland, California. When the youths saw an unmarked police car approach they panicked and ran. The officers gave chase. Hodari D., seeing one policeman running at him, tossed away a small "rock" that turned out to be crack cocaine. Seconds later, Officer Pertoso tackled Hodari D. and a search of his person revealed a pager and $130 in cash.

California conceded that the police officer did not have reasonable suspicion to stop Hodari D.[3] The Supreme Court indicated that it would leave for another day the issue of whether an individual fleeing in panic upon seeing police officers constitutes a reasonable suspicion for a stop.[4] Justice Scalia, writing for the majority, asserted "[t]hat it would be unreasonable to stop, for a brief inquiry, young men who scatter in panic upon the mere sighting of the police is not self-evident, and arguably contradicts proverbial common sense. See Proverbs 28:1 ('The wicked flee when no man pursueth')."[5] Justice Stevens, on the other hand, writing for the dissent, indicated that the majority mistakenly assumed that innocent residents have no reason to fear the sudden approach of strangers. "We have previously considered, and rejected, this ivory-towered analysis of the real world for it fails to describe the experience of many residents, particularly if they are members of a minority."[6] He indicated that common knowledge supports the proposition that innocent individuals also may flee from fear of the unknown or because they are unwilling to appear as witnesses.[7]

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[1] 49 Crim. L. Rep. (BNA) 2050 (U.S. Apr. 23, 1991).

[2] *Id.* at 2051.

[3] *Id.* at 2050 n.1.

[4] *Id.*

[5] *Id.*

[6] *Id.* at 2052 n.4.

[7] *Id.*

The majority, in reaching a conclusion that no seizure occurred, relied upon the common-law analysis of what constitutes the seizure of an inanimate object.[8] The majority effectively said that no seizure of the person occurs unless accompanied by an effective application of physical force or a show of authority that restrains the subject's freedom of liberty. An application of physical force—including the touching of an individual—that is ineffective and allows the individual to flee, is not an arrest. The Court also indicated that an unlawful show of authority, such as an order to stop, would not call the exclusionary rule into play. "Unlawful orders would not be deterred, moreover, by sanctioning through the exclusionary rule those of them that are not *obeyed*.... It fully suffices to apply the deterrent to [law enforcement officials'] genuine successful seizures."[9]

The dissenters took the majority to task on the issue of what a common-law arrest actually is and on the application of *United States v. Mendenhall*.[10] On common-law arrests, Justice Stevens indicated that looking at only arrests is inappropriate; rather, one should look at attempted arrests.[11] He indicated that the facts do not describe an actual arrest, but an attempted arrest. Justice Stevens stated that an officer may be guilty of assault based on an attempted arrest even though no successful touching occurred.[12]

As has been true in the past, the majority was criticized for deviating from the language of *Katz v. United States*[13] and for applying common-law rules to today's society. Both the majority and dissent agree that *Katz* "unequivocally rejects the notion that the common law of arrest defines the limits of the term 'seizure' in the Fourth Amendment."[14] Justice Scalia noted, however, that the common law "defines the limits of a seizure of the person. What *Katz* stands for is the proposition that items which could not be subject to seizure at common law (e.g., telephone conversations) can be seized under the Fourth Amendment."[15] Does this also apply to searches? What if enhanced technology is employed? If the common law—rather than *Katz*—applies, a change in case law may be coming.

Concerning the application of *Mendenhall*, the majority said, "A person has been 'seized' within the meaning of the Fourth Amendment only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave."[16] Then the majority indicated that the emphasis is on "only if."[17] The objective test of *Mendenhall* must be met, but meeting the test alone does not suffice to create a fourth amendment seizure.[18] That is, unless the subject acquiesces to a show of authority or something more, no seizure has occurred.[19]

The dissent quoted the objective, first part of the test with examples of seizures to include "the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled."[20] The dissent apparently did not wish to narrow fourth amendment protections by expanding the elements of a seizure of the person.

Underlying the question of seizure is the fact that the Court was not called upon to review whether any lawful basis existed for the officer's pursuit. The State of California conceded that the officer did not even have "reasonable suspicion."[21] Therefore, if the pursuit or show of authority was itself a seizure, then the discarded cocaine was the product of unlawful activity and subject to exclusion.

Unfortunately, the concession that no basis for a seizure existed leaves a shortfall in the Court's opinion to be addressed another day. Until that day, law enforcement is left to conform its conduct to speculation about what the Court might say. But the facts of this case—two officers in a high crime area, late in the evening, encountering four or five persons huddled around a car who, upon recognizing the police, flee—do not seem particularly

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[8] *Id.* at 2051.

[9] *Id.*

[10] 446 U.S. 544 (1980).

[11] *Hodari D.*, 49 Crim. L. Rep. at 2052.

[12] *Id.* at 2053 n.7.

[13] 389 U.S. 347 (1967).

[14] *Hodari D.*, 49 Crim. L. Rep. at 2051 n.3 (citing Stevens, J., dissenting).

[15] *Id.* at 2051 at n.3.

[16] *Id.* at 2051 (citing *Mendenhall*, 446 U.S. at 554).

[17] *Id.* at 2051.

[18] *Id.*

[19] *Id.*

[20] *Id.* at 2054 (citing *Mendenhall*, 446 U.S. at 554).

[21] *Id.* at 2050 n.1.

unique. The dissent rightly is concerned about law enforcement having unrestricted freedom short of touching.[22] Even the dissenting justices, however, surely would not expect law enforcement officers to sit by idly, simply shrugging their shoulders as they watched obviously suspicious individuals flee.

The structure for analysis of this entire sequence already existed in fourth amendment case law before this decision. Three recognized, well-defined levels of police interaction with citizens exist: (1) the voluntary contact from which the citizen is free to walk away;[23] (2) the stop that must be predicated upon reasonable suspicion;[24] and (3) the arrest or apprehension that is predicated upon probable cause.[25] Certainly, Hodari D.'s encounter with the officer was not voluntary. At the other end of the spectrum, the facts known to the officer did not rise to the level of probable cause. Accordingly, the law would have permitted the officer to do only one thing under these circumstances—initiate a stop.

Did a foundation for a stop—that is a reasonable, articulable suspicion of criminal activity—exist in this case? Perhaps not when the officers initially observed the car and individuals.[26] When they took flight in response to the mere presence of the officers, however, suspicion of wrongdoing reasonably arises from the totality of the circumstances. California's concession was bad advocacy. A reasonable society expects that its law enforcement officers take action to investigate suspicious circumstances.

The officers here embarked on a reasonable course of action to investigate—that is, they pursued to effect a stop. Reasonable force should be available to effect a stop[27] and the officers here used reasonable force. Shouting "stop in the name of the law" is wasteful when a suspect obviously is fleeing the law. Likewise, firing warning shots in Oakland, California—a large metropolitan area—may have endangered the innocent public. In this case, foot pursuit was a logical, reasonable means of fulfilling society's expectations of law enforcement.

Providing the guidance necessary for officers to determine what conduct is lawful is critical to the deterrent purpose of the exclusionary rule. The assembly of individuals in a high crime part of Oakland, as well as their flight, either provides reasonable suspicion or it does not. For reasonable officers faced with these circumstances to pursue, is either reasonable, or it is not. *Terry v. Ohio*[28] actually announces that the Supreme Court expects officers to contemplate the basis for their actions and make these decisions every day.[29] The decision here is simple—reasonable officers confronted with the facts of this case react, and are expected to react, precisely as Officer Pertoso did. The government conduct at issue was reasonable; the state's concession was not.

On the other hand, consider the rule that flight alone constitutes a basis for a seizure, regardless of when the flight takes place. One must consider the impact this rule would have on the location where the show of law enforcement occurs—for example, the ghetto or low-income housing. The mores of the community may dictate that individuals not have contact with the police, not be witnesses, or not be involved in any way—all of which may be reasons for flight. Therefore, using flight alone as a basis for a stop may be worrisome.

In addition to the norms of the locality, timing is also important. A majority indicated that a seizure would not take place when a chase has commenced, unless the subject succumbs to the chase or acquiesces to a show of authority. This may switch the inquiry in a number of areas, such as the stopping of automobiles, searches in airports and on busses, and other examples of show of authority. In all these instances a flight—or something similar to flight—may occur, but whether that alone means something thrown away is abandoned and admissible at trial, without any inquiry into the law enforcement conduct involved, is questionable. The same argument applies against the idea of not applying the exclusionary rule. By engaging in a hyperbole, the *Hodari D.* dissent may have indicated that the exclusionary rule will not apply, regardless of how outrageous or unreasonable the conduct of the officer is. The nature of the police misconduct, however, must be considered in protecting the right to privacy and in encouraging proper conduct.

Hodari D. will have an impact on the military. Because the issue raised in *Hodari D.* is not mentioned in the Military Rules of Evidence, *Hodari D.* is controlling. In

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[22] *Id.* at 2057.

[23] *See* Florida v. Royer, 460 U.S. 491, 497 (1983); *Mendenhall*, 446 U.S. at 544.

[24] *See* Terry v. Ohio, 392 U.S. 1 (1968); Manual for Courts-Martial, United States, 1984, Mil. R. Evid. 314(f).

[25] *See* Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 302(c) [hereinafter R.C.M.].

[26] *See* Brown v. Texas, 443 U.S. 143 (1972).

[27] *See* LaFave, *Search and Seizure* 368 (2d ed. 1987) (quoting American Law Institute Model Code of Pre-Arraignment Procedure, § 110.2(3) (1975)).

[28] *Terry*, 392 U.S. at 21

[29] *Id.* ("And in justifying the particular intrusion the police officer must be able to point to specific and articulable facts which, taken together with the rational inferences from those facts, reasonably warrant that intrusion").

addition, *Hodari D.* overrules cases that indicate that when illegal police activity prompts abandonment of property, the evidence will be inadmissible.[30] On the remaining question of whether flight alone may be sufficient to establish reasonable suspicion, at least one military court, in dicta, has indicated that it is.[31]

Part IV: Promptness and Presumptions in the Review of a Warrantless Arrest

In *Riverside County, California v. McLaughlin*[32] the United States Supreme Court addressed the time within which warrantless arrests must be reviewed by a neutral and detached individual. In addition to reaffirming *Gerstein v. Pugh*'s[33] call for a "prompt judicial determination of probable cause as a prerequisite to an extended pretrial detention following a warrantless arrest,"[34] the Court held that when the determination is combined with another pretrial proceeding, a presumption of reasonableness arises if the combined proceeding is held within forty-eight hours of the warrantless arrest. On the other hand, probable cause reviews conducted more than forty-eight hours after a warrantless arrest are presumptively unreasonable.[35] The dissenting justices argued that delaying the neutral review of probable cause, merely to combine it with some other pretrial proceeding, is violative of the requirement for "prompt" judicial review.[36]

At issue in this case was a procedure used by the County of Riverside, California, in which a review of a warrantless arrest was combined with arraignment procedures. One of California's rules of procedure provided that arraignments must be conducted within two days of arrest. The rule excluded, however, weekends and holidays. Accordingly, by way of illustration, the Supreme Court noted that a person arrested before the Thanksgiving holiday may experience a "7-day delay" before arraignment.[37] Because the Court perceived a split in the circuit courts of appeals on whether *Gerstein* permitted delay to combine probable cause with other pretrial proceedings,[38] the Court granted certiorari to resolve the meaning of "prompt" under *Gerstein*.

Writing for the majority, Justice O'Connor pointed out that *Gerstein* did not mandate "immediate" judicial review of warrantless arrests. Rather, the Court "left it to the individual States to integrate prompt probable cause determinations into their differing systems of pretrial procedures."[39] Therefore, no constitutional flaw exists in integrated procedures that have inherent delays. *Gerstein*, however, "is not a blank check" that permits unconstrained integration; flexible, integrated procedures still must be "prompt."[40]

Obviously troubled by the potential for lengthy, unreviewed detention of presumptively innocent persons, Justice O'Connor concluded that "prompt" is a "vague standard [that] simply has not provided sufficient guidance."[41] To dispel uncertainty, the majority announced essentially the following rule: a judicial determination of probable cause made within forty-eight hours of a warrantless arrest will be presumptively prompt; conversely, a review later than forty-eight hours will be presumptively unreasonable. Neither side of the forty-eight-hour rule is concrete. Reviews within the forty-eight-hour window still may be unreasonable when, for example, the delay is intentional. On the other hand, neutral reviews of probable cause later than forty-eight hours may be shown to have been reasonable when, for example, the government can show "a bona fide emergency or other extraordinary circumstances."[42] The Court warned, however, that delays merely to combine proceedings, or for the even lesser reason of holidays, risk being viewed as unreasonable.[43]

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[30] *See, e.g.*, United States v. Edwards, 3 M.J. 921 (A.C.M.R. 1977); United States v. Swinson, 48 C.M.R. 197 (A.F.C.M.R. 1974).

[31] United States v. Schmidt, 4 M.J. 893 (N.M.C.M.R. 1978); *see also* LaFave, *supra* note 27, at 448-49 (discussing the reactions of suspects as part of the totality of the circumstances and whether reactions alone may justify an investigative stop).

[32] 49 Crim L. Rep. (BNA) 2104 (U.S. May 13, 1991).

[33] 420 U.S. 103 (1975).

[34] *McLaughlin*, 49 Crim. L. Rep. at 2104.

[35] *Id.* at 2107.

[36] *Id.* at 2108 (Marshall, Blackmun, Stevens, JJ., dissenting); *id.* at 2108-111 (Scalia, J., dissenting).

[37] *Id.* at 2104.

[38] The Ninth Circuit held that Riverside County had violated *Gerstein*'s requirement for a prompt review after the administrative processing of the arrest. *See* McLaughlin v. County of Riverside, 888 F.2d 1276 (9th Cir. 1989). On the other hand, the Supreme Court pointed out that the Second Circuit permitted some delay in the probable cause review to combine it with other pretrial procedures. *See* Williams v. Ward, 845 F.2d 374 (2d Cir. 1988), *cert. denied*, 488 U.S. 1020 (1989).

[39] *McLaughlin*, 49 Crim. L. Rep. at 2106.

[40] *Id.* at 2107.

[41] *Id.*

[42] *Id.*

[43] *Id.* at 2107-08.

Four justices rejected the majority's forty-eight-hour rule. Justice Marshall, with whom Justices Blackmun and Stevens joined, agreed with Justice Scalia's separate dissent, which defined "prompt" as "immediately upon completion of the 'administrative steps incident to arrest.'"[44] Delay attributable to combining early pretrial proceedings with probable cause reviews are unacceptable, and thus unreasonable. Justice Scalia went further, however, and defined what he believes to be a reasonable time within which to hold a review. The available data, various state procedures, and court cases convinced Justice Scalia that a twenty-four-hour rule would be appropriate.[45]

McLaughlin presents some interesting questions for military procedure. The first question obviously is whether the case will apply to the military. Clearly it does.[46] As a rule of constitutional criminal procedure, the rule requiring review of probable cause within forty-eight hours applies to the military unless some unique military exigency justifies a different rule. While technical arguments about differences in military procedure may abound, the simple fact is that the armed forces have no unique, compelling military necessity surrounding apprehension and pretrial confinement that would tend to justify a different rule. Moreover, technical arguments likely will fail because *Gerstein*—upon which *McLaughlin* was based—partially underlies the specific review procedures required by the Manual for Courts-Martial.[47]

A second question raised by *McLaughlin* is whether the military steps for initiating pretrial confinement suffice to provide a neutral review of probable cause within forty-eight hours. Specifically, does the commander's decision to impose pretrial confinement under the guidelines in the Manual[48] constitute a neutral review? Judge Everett recently suggested that a commander ordering a soldier into pretrial confinement "must act in a neutral capacity."[49] Arguably then, a neutral and detached commander's probable cause decision or review of pretrial confinement, if accomplished within forty-eight hours, will satisfy *McLaughlin*. On the other hand, the practical workings of imposing pretrial confinement may jeopardize the imposing commander's neutrality. In many instances, for example, the commander who authorizes pretrial confinement is the same individual who swears to the charges and thereby becomes an accuser.

The next question is whether other procedures exist, or easily could be implemented, to satisfy the forty-eight-hour rule. Army procedures and structure seem to offer three possible alternatives. First, assuming an immediate commander is not neutral, pretrial confinement decisions can be made by the next senior commander in the chain of command. This would assure the neutral review demanded by *McLaughlin*—a step removed from the potential accuser. A second possible alternative arises from the arrangement by which many jurisdictions vest final approval for pretrial confinement in the convening authority or a designee—often the staff judge advocate. That approval should include a probable cause review that potentially would satisfy *McLaughlin*. A third possible alternative within the Army involves having part-time military magistrates at the installation level review the probable cause determination when pretrial confinement initially is processed.[50] Each of these alternatives can be implemented without changing the Manual and, arguably, each would satisfy the requirement for neutral review.

One final question remains—that is, what impact does *McLaughlin* have upon the current provisions of the Manual for Courts-Martial? The answer to this question is found in the analysis to Rule for Courts-Martial (R.C.M.) 305(i). The neutral and detached review within seven days called for by R.C.M. 305(i) was intended, in part, to satisfy the requirements of *Gerstein*. The analysis, however, states, "Federal courts are willing to tolerate delays of several days, so long as the defendant does not suffer prejudice beyond the confinement itself during such periods."[51] *McLaughlin* undermines this conclusion of the analysis. Obviously, seven days is now unreasonable, and no readily apparent circumstances justify keeping a seven-day rule.

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[44] *Id.* at 2108 (quoting *Gerstein*, 420 U.S. at 114).

[45] *Id.* at 2110.

[46] While the Supreme Court has assumed that portions of the Bill of Rights apply to the military, the Court of Military Appeals has indicated that all portions apply "except those which ... by necessary implication [are] inapplicable." United States v. Jacoby, 29 C.M.R. 244, 246-47 (C.M.A. 1960).

[47] The Court of Military Appeals built upon *Gerstein* in Courtney v. Williams, 1 M.J. 267 (C.M.A. 1976), holding that a neutral review of *both* probable cause—that is, can the accused be detained?—*and* the basis for pretrial confinement—that is, should the accused be detained?—must occur. R.C.M. 305(i) specifically requires both a review of the constitutional basis for pretrial confinement and the need for pretrial confinement. *See* R.C.M. 305(i) analysis, at A21-16.

[48] *See* R.C.M. 305(d).

[49] United States v. Sharrock, 32 M.J. 326, 333 (C.M.A. 1991) (Everett, S.J., concurring in the judgment).

[50] *See* Army Reg. 27-10, Legal Services: Military Justice, paras. 9-1, 9-2 (22 Dec. 1989).

[51] R.C.M. 305(i) analysis, at A21-16.

CLE News

1. Resident Course Quotas

The Judge Advocate General's School restricts attendance at resident CLE courses to those who have received allocated quotas. If you have not received a welcome letter or packet, you do not have a quota. Personnel may obtain quota allocations from local training offices, which receive them from the MACOMs. Reservists obtain quotas through their unit or, if they are nonunit reservists, through ARPERCEN, ATTN: DARP-OPS-JA, 9700 Page Boulevard, St. Louis, MO 63132-5200. Army National Guard personnel request quotas through their units. The Judge Advocate General's School deals directly with MACOMs and other major agency training offices. To verify a quota, you must contact the Nonresident Instruction Branch, The Judge Advocate General's School, Army, Charlottesville, Virginia 22903-1781 (Telephone: autovon 274-7115, extension 307; commercial phone: (804) 972-6307).

2. TJAGSA CLE Course Schedule

1991

5-9 August: 48th Law of War Workshop (5F-F42).

12-16 August: 15th Criminal Law New Developments Course (5F-F35).

19-23 August: 2d Senior Legal NCO Management Course (512-71D/E/40/50).

26-30 August: Environmental Law Division Workshop.

9-13 September: 10th Operational Law Seminar (5F-F47).

23-27 September: 4th Installation Contracting Course (5F-F18).

7-11 October: 1991 JAG Annual Continuing Legal Education Workshop.

15 October-20 December: 126th Basic Course, (5-27-C20).

21-25 October: 108th Senior Officers Legal Orientation (5F-F1).

21-25 October: 9th Federal Litigation Course (5F-F29).

28 October-1 November: 49th Law of War Workshop (5F-F42).

28 October-1 November: 29th Legal Assistance Course (5F-F23).

4-8 November: 27th Criminal Trial Advocacy Course (5F-F32).

12-15 November: 5th Procurement Fraud Course (5F-F36).

18-22 November: 33d Fiscal Law Course (5F-F12).

2-6 December: 11th Operational Law Seminar (5F-F47).

9-13 December: 40th Federal Labor Relations Course (5F-F22).

1992

6-10 January: 109th Senior Officers Legal Orientation (5F-F1).

13-17 January: 1992 Government Contract Law Symposium (5F-F11).

21 January-27 March: 127th Basic Course (5-27-C20).

3-7 February: 28th Criminal Trial Advocacy Course (5F-F32).

10-14 February: 110th Senior Officers Legal Orientation (5F-F1).

24 February-6 March: 126th Contract Attorneys Course (5F-F10).

9-13 March: 30th Legal Assistance Course (5F-F23).

16-20 March: 50th Law of War Workshop (5F-F42).

23-27 March: 16th Administrative Law for Military Installations Course (5F-F24).

30 March-3 April: 6th Government Materiel Acquisition Course (5F-F17).

6-10 April: 111th Senior Officers Legal Orientation (5F-F1).

13-17 April: 12th Operational Law Seminar (5F-F47).

13-17 April: 3d Law for Legal NCO's Course (512-71D/E/20/30).

21-24 April: Reserve Component Judge Advocate Workshop (5F-F56).

27 April-8 May: 127th Contract Attorneys Course (5F-F10).

18-22 May: 34th Fiscal Law Course (5F-F12).

18-22 May: 41st Federal Labor Relations Course (5F-F22).

18 May-5 June: 35th Military Judge Course (5F-F33).

1-5 June: 112th Senior Officers Legal Orientation (5F-F1).

8-10 June: 8th SJA Spouses' Course (5F-F60).

8-12 June: 22d Staff Judge Advocate Course (5F-F52).

15-26 June: JATT Team Training (5F-F57).

15-26 June: JAOAC (Phase II) (5F-F55).

22-26 June: U.S. Army Claims Service Training Seminar.

6-10 July: 3d Legal Administrator's Course (7A-550A1).

8-10 July: 23d Methods of Instruction Course (5F-F70).

13-17 July: Professional Recruiting Training Seminar.

13-17 July: 4th STARC JA Mobilization and Training Workshop.

20 July-25 September: 128th Basic Course (5-27-C20).

20-31 July: 128th Contract Attorneys Course (5F-F10).

3 August-14 May 93: 41st Graduate Course (5-27-C22).

3-7 August: 51st Law of War Workshop (5F-F42).

10-14 August: 16th Criminal Law New Developments Course (5F-F35).

17-21 August: 3d Senior Legal NCO Management Course (512-71D/E/40/50).

24-28 August: 113th Senior Officers Legal Orientation (5F-F1).

31 August-4 September: 13th Operational Law Seminar (5F-F47).

14-18 September: 9th Contract Claims, Litigation, and Remedies Course (5F-F13).

3. Civilian Sponsored CLE Courses

October 1991

2-4: FP, Understanding Overhead in Government Contracts, Washington, DC.

3-4: FP, Practical Guide to FAR/DFARS, Las Vegas, NV.

4: NYSBA, The Art of Cross Examination, Long Island, NY.

4: NYSBA, New York Appellate Practice, New York, NY.

4-6: NITA, Advocacy Teacher Training Sessions, Berkeley, CA.

6-11: AAJE, Search and Seizure; Recent U.S. Supreme Court Criminal Procedures Cases; and the Law of Hearsay, Durham, NH.

7-8: FP, Business Immigration Law Today, Washington, DC.

7-8: FP, Government Contract Accounting, San Francisco, CA.

7-9: FP, Practical Negotiation of Government Contracts, Washington, DC.

7-9: FP, Cost Accounting Standards, Washington, DC.

7-11: SLF, Short Course on Antitrust Law, Westin, TX.

7-11: FP, The Skills of Contract Administration, Washington, DC.

8: NYSBA, Enforcement of Judgments, Long Island, NY.

9: NYSBA, Structured Settlements, Buffalo, NY.

9-11: FP, Government Contract Claims, San Francisco, CA.

10-11: FP, ERISA Claims & Litigation, Washington, DC.

10-11: FP, Government Environmental Contracting, Washington, DC.

11: NYSBA, Structured Settlements, Syracuse, NY.

13-16: NCDA, First Annual National Conference on Domestic Violence, Las Vegas, NV.

15-17: FP, Advanced Subcontracting and Teaming Agreements, San Diego, CA.

16-17: FP, Rights in Technical Data & Patents, Washington, DC.

16-18: FP, Practical Construction Law, Boston, MA.

16-18: FP, Changes & Claims in Government Construction, San Diego, CA.

17-18: SLF, Institute on Labor Law, Westin, TX.

17-18: FP, Practical Guide to FAR/DFARS, Washington, DC.

17-18: LSU, 1991 Recent Developments in Legislation & Jurisprudence, Monroe, LA.

18: NYSBA, New York Appellate Practice, Rochester, NY.

18: NYSBA, Strategy & Tactics in Business & Commercial Litigation, New York, NY.

21-22: FP, Export Control of Equipment & Technology, Santa Barbara, CA.

21-23: FP, Changes in Government Contracts, Los Angeles, CA.

25: NYSBA, New York Appellate Practice, Albany, NY.

25: NYSBA, Enforcement of Judgments, New York, NY.

28-29: FP, Government Contract Accounting, Washington, DC.

28-29: FP, Government Environmental Contracting, San Francisco, CA.

28-30: FP, Practical Environmental Law, Coronado, CA.

28-30: FP, Pension Law Today, La Jolla, CA.

28-30: FP, Government Contract Costs, San Diego, CA.

28-November 1: FP, Concentrated Course in Government Contracts, Washington, DC.

29-November 1: ESI, Preparing and Analyzing Statements of Work and Specifications, Denver, CO.

31-November 1: FP, ERISA Claims & Litigation, New Orleans, LA.

For further information on civilian courses, please contact the institution offering the course. The addresses appear in the February 1991 issue of *The Army Lawyer*.

4. Mandatory Continuing Legal Education Jurisdictions and Reporting Dates

Thirty-six states currently have a mandatory continuing legal education (CLE) requirement.

In these MCLE states, all *active* attorneys are required to attend approved continuing legal education programs for a specified number of hours each year or over a period of years. Additionally, bar members are required to report periodically either their compliance or reason for exemption from compliance. Due to the varied MCLE programs, JAGC Personnel Policies, para. 7-11c (Oct. 1988) provides that staying abreast of state bar requirements is the responsibility of the individual judge advocate. State bar membership requirements and the availability of exemptions or waivers of MCLE for military personnel vary from jurisdiction to jurisdiction and are subject to change. TJAGSA *resident* CLE courses have been approved by most of these MCLE jurisdictions.

Listed below are those jurisdictions in which some form of mandatory continuing legal education has been adopted with a brief description of the requirement, the address of the local official, and the reporting date. The "*" indicates that TJAGSA *resident* CLE courses have been approved by the state.

State	Local Official	CLE Requirements
*Alabama	MCLE Commission Alabama State Bar 415 Dexter Ave. Montgomery, AL 36104 205-269-1515	-12 hours per year. -Active duty military attorneys are exempt but must declare exemption. -Reporting date: 31 December.
Arizona	Director, Programs and Public Services Division 363 North First Ave. Phoenix, AZ 85003 602-252-4804	-15 hours each year including 2 hours professional responsibility. -Reporting date: 15 July.
*Arkansas	Director of Professional Programs 1501 N. University #311 Little Rock, AR 72207 501-664-8737	-12 hours per year. -Reporting date: 30 June.
*Colorado	CLE Dominion Plaza Building 600 17th St. Suite 520-S Denver, CO 80202 303-893-8094	-45 hours, including 2 hours of legal ethics during 3-year period. -Newly admitted attorneys must also complete 15 hours in basic legal and trial skills within 3 years. -Reporting date: Anytime within 3-year period.
California	State Bar of California 100 Van Ness 28th Floor San Francisco, CA 94102 415-241-2100	-36 hours every 36 months. Eight hours must be on legal ethics and/or law practice management, with at least 4 hours in legal ethics, 1 hour of substance abuse and emotional distress, and 1 hour on the elimination of bias. -Attorneys employed by the Federal Government are exempt. -Reporting date: Effective 1 February 1992. Credits earned from 1 September 1991 may be carried forward to the initial compliance period.

*Delaware	Commission on CLE 831 Tatnall Street Wilmington, DE 19801 302-658-5856	-30 hours during 2-year period. -Reporting date: 31 July.
*Florida	Director, Legal Specialization & Education The Florida Bar 650 Apalachee Parkway Tallahassee, FL 32399-2300 904-561-5690	-30 hours during 3-year period, including 2 hours of legal ethics. -Active duty military are exempt but must declare exemption during reporting period. -Reporting date: Assigned month every 3 years.
*Georgia	Georgia Commission on Continuing Lawyer Competency 800 The Hurt Building 50 Hurt Plaza Atlanta, GA 30303 404-527-8710	-12 hours per year, including 1 hour legal ethics, 1 hour professionalism and 3 hours trial practice (trial attorneys only). -Reporting date: 31 January.
*Idaho	Deputy Director Idaho State Bar P.O. Box 895 Boise, ID 83701-0898 208-342-8959	-30 hours during 3-year period. -Reporting date: Every third year depending on year of admission.
*Indiana	Indiana Commission for CLE 101 West Ohio Suite 410 Indianapolis, IN 46204 317-232-1943	-36 hours within a 3-year period (minimum 6 hours per year). -New admittees by examination are given 3-year grace period beginning 1/1 before admission. -Reporting date: 31 December.
*Iowa	Executive Director Commission on CLE State Capitol Des Moines, IA 50319 515-281-3718	-15 hours each year, including 2 hours of legal ethics during 2-year period. -Reporting date: 1 March.
*Kansas	CLE Commission Kansas Judicial Center 301 West 10th Street Room 23-S Topeka, KS 66612-1507 913-357-6510	-12 hours each year. -Reporting date: 1 July.
*Kentucky	CLE Kentucky Bar Association W. Main at Kentucky River Frankfort, KY 40601 502-564-3795	-15 hours per year, including 2 hours of legal ethics. -Bridge the Gap Training for new attorneys. -Reporting date: June 30.
*Louisiana	CLE Coordinator Louisiana State Bar Association 601 St. Charles Ave. New Orleans, LA 70130 504-566-1600	-15 hours per year, including 1 hour of legal ethics. -Active duty military are exempt but must declare exemption. -Reporting date: 31 January.
Michigan	Executive Director State Bar of Michigan 306 Townsend St. Lansing, MI 48933 517-372-9030	-30 or 36 hours (depending on whether admitted in first or second half of fiscal year) within 3 years of becoming active member of bar. Six or 12 hours the first year, 12 hours second year and 12 hours third year. Courses must be taken in sequence identified by CLE Commission. -Reporting date: 31 March

*Minnesota	Director, Minnesota State Board of CLE 1 West Water St., Suite 250 St. Paul, MN 55107 612-297-1800	-45 hours during 3-year period. -Reporting date: 30 August.
*Mississippi	CLE Administrator Mississippi Commission on CLE P.O. Box 2168 Jackson, MS 39225-2168 601-948-4471	-12 hours per year. -Active duty military attorneys are exempt, but must declare exemption. -Reporting date: 31 December. (In the process of changing to 1 August).
*Missouri	Director of Programs P.O. Box 119 Jefferson City, MO 65102 314-635-4128	-15 hours per year, including 3 hours legal ethics every 3 years. -New admittees 3 hours professionalism, legal/judicial ethics, or malpractice in 12 months. -Reporting date: 31 July.
*Montana	MCLE Administrator Montana Board of CLE P.O. Box 577 Helena, MT 59624 406-442-7660	-15 hours per year. -Reporting date: 1 March.
*Nevada	Executive Director Board of CLE 295 Holcomb Avenue Suite 5-A Reno, NV 89502 702-329-4443	-10 hours per year. -Reporting date: 1 March.
*New Mexico	MCLE Administrator P.O. Box 25883 Albuquerque, NM 87125 505-842-6132	-15 hours per year, including 1 hour of legal ethics. -Reporting date: 30 days after program.
*North Carolina	Executive Director The North Carolina State Bar 208 Fayetteville Street Mall P.O. Box 25148 Raleigh, NC 27611 919-733-0123	-12 hours per year including 2 hours of legal ethics. Special 3-hour block of ethics once every 3 years. -New attorneys 9 hours practical skills each of first 3 years of practice. -Armed Service members on full-time active duty exempt, but must declare exemption. -Reporting date: 28 February of succeeding year.
*North Dakota	North Dakota CLE Commission P.O. Box 2136 Bismark, ND 58502 01-255-1404	-45 hours during 3-year period. -Reporting date: period ends 6/30; affidavit must be received by 7/31.
*Ohio	Secretary of the Supreme Court Commission on CLE 30 East Broad Street Second Floor Columbus, OH 43266-0419 614-644-5470	-24 hours during 2-year period, including 2 hours of legal ethics or professional responsibility every cycle, including instruction on substance abuse. -Active duty military are exempt, but pay a filing fee. -Reporting date: every 2 years by 31 January.
*Oklahoma	MCLE Administrator Oklahoma State Bar P.O. Box 53036 Oklahoma City, OK 73152 405-524-2365	-12 hours per year, including 1 hour of legal ethics. -Active duty military are exempt, but must declare exemption. -Reporting date: 15 February.

*Oregon	MCLE Administrator Oregon State Bar 5200 SW. Meadows Road P.O. Box 1689 Lake Oswego, OR 97034- 0889 503-620-0222-ext. 368	-45 hours during 3-year period, including 6 hours of legal ethics. New admittees—15 hours, 10 must be in practical skills and 2 in ethics. -Reporting date: Initially date of birth; thereafter all reporting periods end every 3 years except new admittees and reinstated members—an initial 1-year period.
*South Carolina	Administrative Director Commission on Continuing Lawyer Competence P.O. Box 2138 Columbia, SC 29202 803-799-5578	-12 hours per year, including 6 hours ethics/ professional responsibility every 3 years in addition to annual MCLE requirement. -Active duty military attorneys are exempt, but must declare exemption. -Reporting date: 15 January.
*Tennessee	Executive Director Commission on CLE 214 2nd Ave. Suite 104 Nashville, TN 37201 615-242-6442	-12 hours per year. -Active duty military attorneys are exempt. -Reporting date: 1 March.
*Texas	Director of MCLE Texas State Bar Box 12487 Capital Station Austin, TX 78711 512-463-1442	-15 hours per year, including 1 hour of legal ethics. -Reporting date: Last day of birth month yearly.
*Utah	MCLE Administrator 645 S. 200 E. Salt Lake City, UT 84111-3834 801-531-9077 800-662-9054	-24 hours during 2-year period, plus 3 hours of legal ethics. -Reporting date: End of 2-year period.
*Vermont	Directors, MCLE Pavilion Office Building Post Office Montpelier, VT 05602 802-828-3281	-20 hours during 2-year period, including 2 hours of legal ethics. -Reporting date: 15 July.
*Virginia	Director of MCLE Virginia State Bar 801 East Main Street 10th Floor Richmond, VA 23219 804-786-5973	-8 hours per year. -Reporting date: 30 June (annual license renewal).
*Washington	Executive Secretary Washington State Board of CLE 500 Westin Building 2001 6th Ave. Seattle, WA 98121-2599 206-448-0433	-15 hours per year. -Reporting date: 31 January (May for supplementals with late filing fee; $50 1st year; $150 2nd year; $250 3rd year, etc.).
*West Virginia	MCLE Coordinator West Virginia State Bar State Capitol Charleston, WV 25305 304-348-2456	-24 hours every 2 years, at least 3 hours must be in legal ethics or office management. -Reporting date: 30 June.
*Wisconsin	Director Board of Attorneys Professional Competence 119 Martin Luther King, Jr. Boulevard Room 405 Madison, WI 53703-3355 608-266-9760	-30 hours during 2-year period. -Reporting date: 20 January every other year. -Nonresident attorneys who do not practice law in Wisconsin are exempt.
*Wyoming	Wyoming State Bar P.O. Box 109 Cheyenne, WY 82003-0109 307-632-9061	-15 hours per year. -Reporting date: 30 January.

Current Material of Interest

1. TJAGSA Materials Available Through Defense Technical Information Center

Each year, TJAGSA publishes deskbooks and materials to support resident instruction. Much of this material is useful to judge advocates and government civilian attorneys who are not able to attend courses in their practice areas. The School receives many requests each year for these materials. However, because outside distribution of these materials is not within the School's mission, TJAGSA does not have the resources to provide publications to individual requestors.

To provide another avenue of availability, the Defense Technical Information Center (DTIC) makes some of this material available to government users. An office may obtain this material in two ways. The first way is to get it through a user library on the installation. Most technical and school libraries are DTIC "users." If they are "school" libraries, they may be free users. The second way is for the office or organization to become a government user. Government agency users pay five dollars per hard copy for reports of 1-100 pages and seven cents for each additional page over 100, or ninety-five cents per fiche copy. Overseas users may obtain one copy of a report at no charge. Practitioners may request the necessary information and forms to become registered as a user from: Defense Technical Information Center, Cameron Station, Alexandria, VA 22314-6145, telephone (703) 274-7633, autovon 284-7633.

Once registered, an office or other organization may open a deposit account with the National Technical Information Service to facilitate ordering materials. DTIC will provide information concerning this procedure when a practitioner submits a request for user status.

DTIC provides users biweekly and cumulative indices. DTIC classifies these indices as a single confidential document, and mails them only to those DTIC users whose organizations have a facility clearance. This will not affect the ability of organizations to become DTIC users, nor will it affect the ordering of TJAGSA publications through DTIC. All TJAGSA publications are unclassified and *The Army Lawyer* will publish the relevant ordering information, such as DTIC numbers and titles. The following TJAGSA publications are available through DTIC. The nine character identifier beginning with the letters AD are numbers assigned by DTIC; users must cite them when ordering publications.

Contract Law

AD B100211 Contract Law Seminar Problems/JAGS-ADK-86-1 (65 pgs).

AD A229148 Government Contract Law Deskbook Vol. 1/ADK-CAC-1-90-1 (194 pgs).

AD A229149 Government Contract Law Deskbook, Vol. 2/ADK-CAC-1-90-2 (213 pgs).

AD B144679 Fiscal Law Course Deskbook/JA-506-90 (270 pgs).

Legal Assistance

AD B092128 USAREUR Legal Assistance Handbook/JAGS-ADA-85-5 (315 pgs).

AD B136218 Legal Assistance Office Administration Guide/JAGS-ADA-89-1 (195 pgs).

AD B135492 Legal Assistance Consumer Law Guide /JAGS-ADA-89-3 (609 pgs).

AD B141421 Legal Assistance Attorney's Federal Income Tax Guide/JA-266-90 (230 pgs).

AD B147096 Legal Assistance Guide: Office Directory/JA-267-90 (178 pgs).

AD A226159 Model Tax Assistance Program/JA-275-90 (101 pgs).

AD B147389 Legal Assistance Guide: Notarial/JA-268-90 (134 pgs).

AD B147390 Legal Assistance Guide: Real Property/JA-261-90 (294 pgs).

AD A228272 Legal Assistance: Preventive Law Series/JA-276-90 (200 pgs).

AD A229781 Legal Assistance Guide: Family Law/ACIL-ST-263-90 (711 pgs).

AD 230618 Legal Assistance Guide: Soldiers' and Sailors' Civil Relief Act/JA-260-91 (73 pgs).

AD 230991 Legal Assistance Guide: Wills/JA-262-90 (488 pgs).

Administrative and Civil Law

AD B139524 Government Information Practices/JAGS-ADA-89-6 (416 pgs).

AD B139522 Defensive Federal Litigation/JAGS-ADA-89-7 (862 pgs).

AD B145359 Reports of Survey and Line of Duty Determinations/ACIL-ST-231-90 (79 pgs).

AD A199644 The Staff Judge Advocate Officer Manager's Handbook/ACIL-ST-290.

AD B145704 AR 15-6 Investigations: Programmed Instruction/JA-281-90 (48 pgs).

Labor Law

AD B145934 The Law of Federal Labor-Management Relations/JA-211-90 (433 pgs).

AD B145705	Law of Federal Employment/ACIL-ST-210-90 (458 pgs).

Developments, Doctrine & Literature

AD B124193	Military Citation/JAGS-DD-88-1 (37 pgs.)

Criminal Law

AD B100212	Reserve Component Criminal Law PEs/ JAGS-ADC-86-1 (88 pgs).
AD B135506	Criminal Law Deskbook Crimes & Defenses/JAGS-ADC-89-1 (205 pgs).
AD B135459	Senior Officers Legal Orientation/JAGS-ADC-89-2 (225 pgs).
AD B137070	Criminal Law, Unauthorized Absences/ JAGS-ADC-89-3 (87 pgs).
AD B140529	Criminal Law, Nonjudicial Punishment/ JAGS-ADC-89-4 (43 pgs).
AD B140543	Trial Counsel & Defense Counsel Handbook/JAGS-ADC-90-6 (469 pgs).
*AD A233-621	United States Attorney Prosecutors/ JA-338-91 (331 pgs).

Reserve Affairs

AD B136361	Reserve Component JAGC Personnel Policies Handbook/JAGS-GRA-89-1 (188 pgs).

The following CID publication is also available through DTIC:

AD A145966	USACIDC Pam 195-8, Criminal Investigations, Violation of the USC in Economic Crime Investigations (250 pgs).

Those ordering publications are reminded that they are for government use only.

*Indicates new publication or revised edition.

2. Regulations & Pamphlets

a. *Obtaining Manuals for Courts-Martial, DA Pams, Army Regulations, Field Manuals, and Training Circulars.*

(1) The U.S. Army Publications Distribution Center at Baltimore stocks and distributes DA publications and blank forms that have Armywide use. Their address is:

Commander
U.S. Army Publications Distribution Center
2800 Eastern Blvd.
Baltimore, MD 21220-2896

(2) Units must have publications accounts to use any part of the publications distribution system. The following extract from AR 25-30 is provided to assist Active, Reserve, and National Guard units.

The units below are authorized publications accounts with the USAPDCs.

(*1*) *Active Army.*

(*a*) *Units organized under a PAC.* A PAC that supports battalion-size units will request a consolidated publications account for the entire battalion except when subordinate units in the battalion are geographically remote. To establish an account, the PAC will forward a DA Form 12-R (Request for Establishment of a Publications Account) and supporting DA 12-series forms through their DCSIM or DOIM, as appropriate, to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896. The PAC will manage all accounts established for the battalion it supports. (Instructions for the use of DA 12-series forms and a reproducible copy of the forms are in DA Pam 25-33.)

(*b*) *Units not organized under a PAC.* Units that are detachment size and above may have a publications account. To establish an account, these units will submit a DA Form 12-R and supporting DA 12-series forms through their DCSIM or DOIM, as appropriate, to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896.

(*c*) *Staff sections of FOAs, MACOMs, installations, and combat divisions.* These staff sections may establish a single account for each major staff element. To establish an account, these units will follow the procedure in (*b*) above.

(*2*) *ARNG units that are company size to State adjutants general.* To establish an account, these units will submit a DA Form 12-R and supporting DA 12-series forms through their State adjutants general to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896.

(*3*) *USAR units that are company size and above and staff sections from division level and above.* To establish an account, these units will submit a DA Form 12-R and supporting DA 12-series forms through their supporting installation and CONUSA to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896.

(*4*) *ROTC elements.* To establish an account, ROTC regions will submit a DA Form 12-R and supporting DA 12-series forms through their supporting installation and TRADOC DCSIM to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896. Senior and junior ROTC units will submit a DA Form 12-R and supporting

DA 12-series forms through their supporting installation, regional headquarters, and TRADOC DCSIM to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896.

Units not described in [the paragraph] above may be authorized accounts. To establish accounts, these units must send their requests through their DCSIM or DOIM, as appropriate, to Commander, USAPPC, ATTN: ASQZ-NV, Alexandria, VA 22331-0302.

Specific instructions for establishing initial distribution requirements are in DA Pam 25-33.

If your unit does not have a copy of DA Pam 25-33, one may be requested by calling the Baltimore USAPDC at (301) 671-4335.

(3) Units that have established initial distribution requirements will receive copies of new, revised, and changed publications as soon as they are printed.

(4) Units that require publications that are not on their initial distribution list can requisition publications using DA Form 4569. All DA Form 4569 requests will be sent to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896. They may be reached at (301) 671-4335.

(5) Civilians can obtain DA Pams through the National Technical Information Service (NTIS), 5285 Port Royal Road, Springfield, Virginia 22161. They can be reached at (703) 487-4684.

(6) Navy, Air Force, and Marine JAGs can request up to ten copies of DA Pams by writing to U.S. Army Publications Distribution Center, ATTN: DAIM-APC-BD, 2800 Eastern Boulevard, Baltimore, MD 21220-2896. Telephone (301) 671-4335.

b. *New publications and changes to existing publications.*

Number	Title	Date
AR 24-3	Information Management Army Life Cycle Management of Information Systems, Interim Change 101	15 Feb 91
AR 36-2	Audit Reports and Followup	26 Apr 91
AR 135-7	Army National Guard and Army Reserve, Interim Change 101	1 Mar 91
AR 195-3	Criminal Investigation, Interim Change 101	15 Apr 91
AR 350-28	Army Exercises	12 Apr 91
AR 360-61	Community Relations, Interim Change 101	7 Dec 90
AR 530-1	Operations Security (OPSEC)	1 May 91
AR 612-201	Personnel Processing, Interim Change 101	4 Jan 91
CIR 25-91-1	1991 Contemporary Military Reading List	12 Apr 91
CIR 25-91-2	Maintenance of Equipment for Sustaining Base Information Systems	10 May 91
CIR 40-91-330	FY 91 Medical, Dental, and Veterinarian Care Rates, Rates for Subsistence, and Crediting FY 91	15 May 91
JFTR	Joint Federal Travel Regulations-Uniformed Services, Change 53	1 May 91
PAM 25-69	List of Approved Recurring Management Information Requirements	Apr 91
UPDATE 23	Message Address Directory DOD Military Pay and Allowances, Change 22	1 May 91 9 Dec 90

3. OTJAG Bulletin Board System.

a. Numerous TJAGSA publications are available on the OTJAG Bulletin Board System (OTJAG BBS). Users can sign on the OTJAG BBS by dialing (703) 693-4143 with the following telecommunications configuration: 2400 baud; parity-none; 8 bits; 1 stop bit; full duplex; Xon/Xoff supported; VT100 terminal emulation. Once logged on, the system will greet the user with an opening menu. Members need only answer the prompts to call up and download desired publications. The system will ask new users to answer several questions and will then instruct them that they can use the OTJAG BBS after they receive membership confirmation, which takes approximately forty-eight hours. *The Army Lawyer* will publish information on new publications and materials as they become available through the OTJAG BBS. Following are instructions for downloading publications and a list of TJAGSA publications that currently are available on the OTJAG BBS. The TJAGSA Literature and Publications Office welcomes suggestions that would make accessing, downloading, printing, and distributing OTJAG BBS publications easier and more efficient. Please send suggestions to The Judge Advocate General's School, Literature and Publications Office, ATTN: JAGS-DDL, Charlottesville, VA 22903-1781.

b. *Instructions for Downloading Files From the OTJAG Bulletin Board System.*

(1) Log-on to the OTJAG BBS using ENABLE and the communications parameters listed in subparagraph a above.

(2) If you never have downloaded files before, you will need the file decompression program that the OTJAG BBS uses to facilitate rapid transfer of files over the phone lines. This program is known as the PKZIP utility. To download it onto your hard drive, take the following actions after logging on:

(a) When the system asks, "Main Board Command?" *J*oin a conference by entering [j].

(b) From the Conference Menu, select the Automation Conference by entering [12].

(c) Once you have joined the Automation Conference, enter [d] to *D*ownload a file.

(d) When prompted to select a file name, enter [pkz110.exe]. This is the PKZIP utility file.

(e) If prompted to select a communications protocol, enter [x] for *X*-modem (ENABLE) protocol.

(f) The system will respond by giving you data such as download time and file size. You should then press the F10 key, which will give you a top-line menu. From this menu, select [f] for *F*iles, followed by [r] for *R*eceive, followed by [x] for *X*-modem protocol.

(g) The menu then will ask for a file name. Enter [c:\pkz110.exe].

(h) The OTJAG BBS and your computer will take over from here. Downloading the file takes about twenty minutes. Your computer will beep when file transfer is complete. Your hard drive now will have the compressed version of the decompression program needed to explode files with the ".ZIP" extension.

(i) When file transfer is complete, enter [a] to *A*bandon the conference. Then enter [g] for *G*ood-bye to log-off of the OTJAG BBS.

(j) To use the decompression program, you will have to decompress, or "explode," the program itself. To accomplish this, boot-up into DOS and enter [pkz110] at the C> prompt. The PKZIP utility then will execute, converting its files to usable format. When it has completed this process, your hard drive will have the usable, exploded version of the PKZIP utility program.

(3) To download a file, after logging on to the OTJAG BBS, take the following steps:

(a) When asked to select a "Main Board Command?" enter [d] to *D*ownload a file.

(b) Enter the name of the file you want to download from subparagraph c below.

(c) If prompted to select a communications protocol, enter [x] for X-modem (ENABLE) protocol.

(d) After the OTJAG BBS responds with the time and size data, type F10. From the top-line menu, select [f] for *F*iles, followed by [r] for *R*eceive, followed by [x] for *X*-modem protocol.

(e) When asked to enter a filename, enter [c:\xxxxx.yyy] where xxxxx.yyy is the name of the file you wish to download.

(f) The computers take over from here, until you hear a beep, which signals that file transfer is complete. The file you downloaded will have been saved on your hard drive.

(g) After file transfer is complete, log-off of the OTJAG BBS by entering [g] to say *G*ood-bye.

(4) To use a downloaded file, take the following steps:

(a) If the file was not a compressed file, it will be usable on ENABLE without prior conversion. Select the file as you would any ENABLE word processing file. ENABLE will give you a bottom-line menu containing several other word processing languages. From this menu, select "ASCII." After the document appears, you can process it like any other ENABLE file.

(b) If the file was compressed (having the ".ZIP" extension) you will have to "explode" it before entering the ENABLE program. From the DOS operating system C> prompt, enter [pkunzip{space}xxxxx.zip] (where "xxxxx.zip" signifies the name of the file you downloaded from the OTJAG BBS). The PKZIP utility will explode the compressed file and make a new file with the same name, but with a new ".DOC" extension. Now enter ENABLE and call up the exploded file "xxxxx.DOC" by following the instructions in paragraph 4(a) above.

c. *TJAGSA Publications Available Through the OTJAG BBS.* Below is a list of publications available through the OTJAG BBS. All active Army JAG offices, and all Reserve and National Guard organizations having computer telecommunications capabilities, should download desired publications from the OTJAG BBS using the instructions in paragraphs a and b above. Reserve and National Guard organizations without organic computer telecommunications capabilities, and individual mobilization augmentees (IMA) having a bona fide military need for these publications, may request computer diskettes containing the publications listed below from the appropriate proponent academic division (Administrative and Civil Law; Criminal Law; Contract Law; International Law; or Doctrine, Developments, and Literature) at The Judge Advocate General's School, Charlottesville, VA 22903-1781. Requests must be accompanied by one 5¼-inch or 3½-inch blank, formatted diskette for each file. In addition, requests from IMAs must contain a statement which verifies that they need the requested publications for purposes related to their military practice of law.

Filename	Title
121CAC.ZIP	The April 1990 Contract Law Deskbook from the 121st Contract Attorneys Course
1990YIR.ZIP	1990 Contract Law Year in Review in ASCII format. It was originally provided at the 1991 Government Contract Law Symposium at TJAGSA
330XALL.ZIP	JA 330, Nonjudicial Punishment Programmed Instruction, TJAGSA Criminal Law Division
ALAW.ZIP	Army Lawyer and Military Law Review Database in ENABLE 2.15. Updated through 1989 Army Lawyer Index. It includes a menu system and an explanatory memorandum, ARLAWMEM.WPF
CCLR.ZIP	Contract Claims, Litigation, & Remedies
FISCALBK.ZIP	The November 1990 Fiscal Law Deskbook from the Contract Law Division, TJAGSA
FISCALBK.ZIP	May 1990 Fiscal Law Course Deskbook in ASCII format
JA200A.ZIP	Defensive Federal Litigation 1
JA200B.ZIP	Defensive Federal Litigation 2
JA210A.ZIP	Law of Federal Employment 1
JA210B.ZIP	Law of Federal Employment 2
JA231.ZIP	Reports of Survey & Line of Duty Determinations Programmed Instruction.
JA235.ZIP	Government Information Practices
JA240PT1.ZIP	Claims—Programmed Text 1
JA240PT2.ZIP	Claims—Programmed Text 2
JA241.ZIP	Federal Tort Claims Act
JA260.ZIP	Soldiers' & Sailors' Civil Relief Act
JA261.ZIP	Legal Assistance Real Property Guide
JA262.ZIP	Legal Assistance Wills Guide
JA263A.ZIP	Legal Assistance Family Law 1
JA265A.ZIP	Legal Assistance Consumer Law Guide 1
JA265B.ZIP	Legal Assistance Consumer Law Guide 2
JA265C.ZIP	Legal Assistance Consumer Law Guide 3
JA266.ZIP	Legal Assistance Attorney's Federal Income Tax Supplement
JA267.ZIP	Army Legal Assistance Information Directory
JA268.ZIP	Legal Assistance Notorial Guide
JA269.ZIP	Federal Tax Information Series
JA271.ZIP	Legal Assistance Office Administration
JA272.ZIP	Legal Assistance Deployment Guide
JA281.ZIP	AR 15-6 Investigations
JA285A.ZIP	Senior Officer's Legal Orientation 1
JA285B.ZIP	Senior Officer's Legal Orientation 2
JA290.ZIP	SJA Office Manager's Handbook
JA296A.ZIP	Administrative & Civil Law Handbook 1
JA296B.ZIP	Administrative & Civil Law Handbook 2
JA296C.ZIP	Administrative & Civil Law Handbook 3
JA296D.ZIP	Administrative & Civil Law Deskbook 4
JA296F.ARC	Administrative & Civil Law Deskbook 6
YIR89.ZIP	Contract Law Year in Review—1989

4. TJAGSA Information Management Items.

a. Each member of the staff and faculty at The Judge Advocate General's School (TJAGSA) has access to the Defense Data Network (DDN) for electronic mail (e-mail). To pass information to someone at TJAGSA, or to obtain an e-mail address for someone at TJAGSA, a DDN user should send an e-mail message to:

"postmaster@jags2.jag.virginia.edu"

The TJAGSA Automation Management Officer also is compiling a list of JAG Corps e-mail addresses. If you have an account accessible through either DDN or PROFS (TRADOC system) please send a message containing your e-mail address to the postmaster address for DDN, or to "crankc(lee)" for PROFS.

b. Personnel desiring to reach someone at TJAGSA via autovon should dial 274-7115 to get the TJAGSA receptionist; then ask for the extension of the office you wish to reach.

c. Personnel having access to FTS 2000 can reach TJAGSA by dialing 924-6300 for the receptionist or 924-6- plus the three-digit extension you want to reach.

d. The Judge Advocate General's School also has a toll-free telephone number. To call TJAGSA, dial 1-800-552-3978.

5. The Army Law Library System.

With the closure and realignment of many Army installations, The Army Law Library System (ALLS) has become the point of contact for redistribution of materials contained in law libraries on those installations. *The Army Lawyer* will continue to publish lists of law library materials made available as a result of base closures. Law librarians having resources available for redistribution should contact Ms. Helena Daidone, JALS-DDS, The Judge Advocate General's School, U.S. Army, Charlottesville, VA 22903-1781. Telephone numbers are autovon 274-7115 ext. 394, commercial (804) 972-6394, or fax (804) 972-6386.

6. Literature and Publications Office Items.

a. The School currently has a large inventory of back issues of *The Army Lawyer* and the *Military Law Review*. Practitioners who desire back issues of either of these publications should send a request to Ms. Eva Skinner, JAGS-DDL, The Judge Advocate General's School, Charlottesville, VA 22903-1781. Not all issues are available and some are in limited quantities. Accordingly, we will fill requests in the order that they arrive by mail.

b. Volume 131 of the *Military Law Review* encountered shipping problems. If you have not received it, please write to Ms. Eva Skinner, JAGS-DDL, The Judge Advocate General's School, Charlottesville, VA 22903-1781.

By Order of the Secretary of the Army:

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